

D265 DAVIS, W. The 1951 Refugee Convention.

WENDY DAVIS

THE 1951 REFUGEE CONVENTION:
PART OF NEW ZEALAND LAW

LLM RESEARCH PAPER
PUBLIC LAW (LAWS 509)

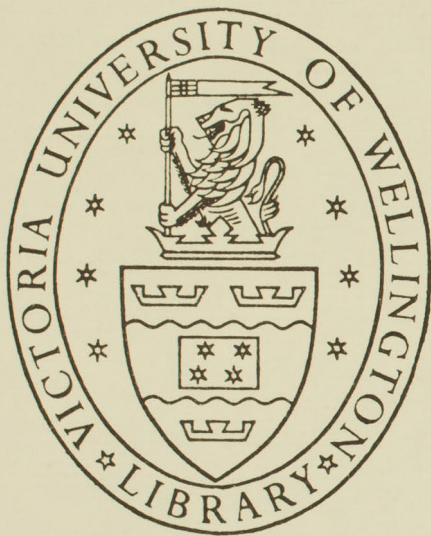
LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

1992

CLOSED
STACK

e
AS741
VUW
A66
D265
1992



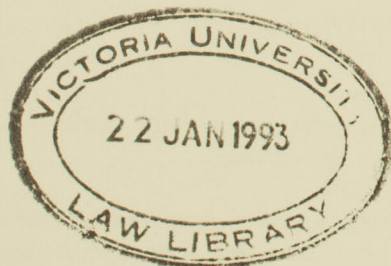


CONTENTS

	ABSTRACT	(iii)
	NOTES AND ACKNOWLEDGEMENTS	(iv)
I	THE GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES	
	A <i>Summary of the Contents of the Convention</i>	1
	B <i>The Convention Definition of Refugee</i>	2
	C <i>Refugee Status Determination Procedures</i>	5
	D <i>The Obligation of Non-Refoulement</i>	
	1 <i>Article 33: the prohibition against refoulement</i>	6
	2 <i>Does article 33 apply to all Convention refugees?</i>	7
	3 <i>When does a refugee become a refugee?</i>	10
	4 <i>Manifestly unfounded claims</i>	11
	5 <i>Is rejection at the frontier refoulement?</i>	12
	6 <i>Is the application of the "safe third country" (or the "country of first asylum") principle refoulement?</i>	14
II	NEW ZEALAND'S DOMESTIC LAW RELATING TO REFUGEES	
	A <i>The Refugee Status Determination Procedure</i>	
	1 <i>History</i>	17
	2 <i>Current procedures</i>	
	(a) <i>Application for refugee status</i>	18
	(b) <i>Initial determination by Refugee Status Section</i>	19
	(c) <i>Right of appeal</i>	19
	(d) <i>The operation of the principle of non-refoulement in New Zealand</i>	21
	(e) <i>Summary</i>	22
	B <i>The Failure to Legislate</i>	23
	C <i>The Immigration Act 1987: Provisions affecting Refugees</i>	
	1 <i>Visas, permits and removal procedures</i>	24
	2 <i>Carrier sanctions</i>	25
	3 <i>Transit visas</i>	26
	4 <i>Detention</i>	26
	D <i>Policy</i>	28
	E <i>Do New Zealand's laws comply with the Refugee Convention?</i>	30
III	THE REFUGEE CONVENTION AS PART OF NEW ZEALAND'S DOMESTIC LAW	
	A <i>Description of Thesis</i>	31
	B <i>Importation of the Refugee Convention into Domestic Law Through the Exercise of Crown Prerogative</i>	
	1 <i>Introduction</i>	32
	2 <i>Does constitutional principle prevent the importation of treaties into domestic law through the exercise of Crown prerogative?</i>	33
	3 <i>The importation of treaties into domestic law through "prerogative legislation"</i>	38

(ii)

4	<i>Does judicial authority prevent importation by prerogative?</i>	40
(a)	A treaty can not directly deprive a citizen of statutory or common law private rights or remedies	42
(b)	Treaties do not directly confer private rights or liabilities	44
(c)	The provisions of an Act of Parliament prevail over inconsistent provisions in an international treaty	45
(d)	The use of treaties in statutory interpretation	45
(e)	Summary of the authorities	46
5	<i>Can the Refugee Convention be imported into domestic law through the exercise of Crown prerogative?</i>	47
6	<i>Implications of the thesis that treaty rights may be imported into domestic law through the exercise of Crown prerogative</i>	51
C	<i>Incorporation of the Customary Rule of Non-Refoulement into New Zealand law</i>	53
D	<i>The Convention as a Mandatory Relevant Consideration in Immigration Decision-Making</i>	55
1	<i>Immigration is a justiciable area</i>	56
2	<i>Discretionary powers are reviewable</i>	57
3	<i>The problem of Brind</i>	58
4	<i>The Refugee Convention as a mandatory relevant consideration in immigration decision-making</i>	62
IV	ENDING	67
APPENDIX 1	Executive Committee Conclusion on Determination of Refugee Status (1977)	69
APPENDIX 2	Refugee Status Appeals Authority: Terms of Reference (1 April 1992)	71
APPENDIX 3	<i>Benipal v Ministers of Foreign Affairs and Immigration: Summary of Facts and Findings</i>	74
APPENDIX 4	Summary of Constitutional Principles Relating to the Exercise, Nature and Reviewability of Crown Prerogative	78
BIBLIOGRAPHY		83



ABSTRACT

The main thesis of this paper is that the 1951 Geneva Convention Relating to the Status of Refugees, and in particular the requirement to establish a procedure for the determination of refugee status and the duty not to return refugees to a place where they may face persecution, is now part of the municipal law of New Zealand.

This paper begins with a brief description of the contents of the Refugee Convention, including the definition of refugee, with a comment on the adequacy of the Convention as a basis for international refugee law. Next, the paper describes the binding nature of the requirement for contracting parties to establish a procedure by which refugee status can be determined. The paper then describes and discusses some aspects of the nature and extent of the obligation not to return a refugee to persecution (*non-refoulement*).

Part II of the paper describes the domestic application of refugee law, including the determination procedure by which the New Zealand immigration authorities decide whether asylum-seekers are to be granted refugee status and the provisions of the Immigration Act 1987 which affect those who come to New Zealand in search of asylum.

Part III of the paper discusses the proposition that the Refugee Convention, including the duty to establish a determination procedure and the duty of *non-refoulement*, has been imported into the domestic law of New Zealand in three ways: first, by the exercise of the power of Crown prerogative, which has transformed the provisions of the Refugee Convention into domestic law; secondly, because *non-refoulement* is a customary rule of international law which, by the operation of the doctrine of incorporation, has become part of domestic law; and thirdly because the provisions of the Refugee Convention are of such overwhelming and manifest importance in an immigration context, that they are now relevant considerations which decision-makers are obliged to take into account when exercising statutory powers of decision which may affect asylum seekers.

The paper concludes that legislation in this area of the law is desirable.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 22000 words.

NOTE ON ABBREVIATIONS

A *Text Books and Articles*

Full references to material referred to in writing this research paper are contained in the bibliography. The following abbreviations are used.

Am J Int'l L	American Journal of International Law
ALJ	Australian Law Journal
Austl YB Int'l L	Australian Yearbook of International Law
Bradley	E C S Wade and A W Bradley <i>Constitutional and Administrative Law</i>
Brownlie <i>Public International Law</i>	I Brownlie <i>Principles of Public International Law</i>
BYIL	British Yearbook of International Law
Fullerton	M Fullerton "Restricting the Flow of Asylum Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights" (1988) 29 Va J Int'l L 35
Goodwin-Gill (1983)	G S Goodwin-Gill <i>The Refugee in International Law</i>
Goodwin-Gill "Non-Refoulement"	G S Goodwin-Gill "Non-Refoulement and the New Asylum Seekers" (1986) 26 Va J Int'l L 898
Halsbury	<i>Halsbury's Laws of England</i>
Harv Int'l LJ	Harvard International Law Journal
Hathaway (1984)	J C Hathaway "The Evolution of Refugee Status in International Law: 1920 - 1950" (1984) ICLQ 348
Hathaway <i>Law of Refugee Status</i>	J C Hathaway <i>The Law of Refugee Status</i>
Hyndman <i>Concept of Asylum</i>	P Hyndman "Refugees Under International Law with a Reference to the Concept of Asylum" (1986) 60 ALJ 148
ICLQ	International and Comparative Law Quarterly
IJRL	International Journal of Refugee Law
ILM	International Legal Materials
Martin <i>Asylum Seekers</i>	D A Martin (ed) <i>The New Asylum Seekers: Refugee Law in the 1980s</i>
NZIS <i>Manual</i>	New Zealand Immigration Service <i>Manual of Immigration Instructions</i>
Plender <i>Asylum</i>	R Plender "The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research" in <i>The Right to Asylum</i> (Hague Academy of International Law)
Plender (1988)	R Plender <i>International Migration Law</i>
UNHCR <i>Handbook</i>	UNHCR <i>Handbook on Procedures and Criteria For Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees</i>
Va J Int'l L	Virginia Journal of International Law
Wilson Report	Report to the Rt Hon W F Birch, Minister of Immigration, on the Process of Refugee Determination, W M Wilson, 29 April 1992

B Cases

Names of cases cited several times may be abbreviated in the text and in footnotes eg *Benipal v Ministers of Foreign Affairs and Immigration* becomes *Benipal*.

C Organisations or judicial bodies

The following abbreviations are used for organisations or bodies which are frequently referred to.

ICOR	Interdepartmental Committee on Refugees
MERT	Ministry of External Relations and Trade
NZIS	New Zealand Immigration Service
RSS	Refugee Status Section (of the New Zealand Immigration Service)
RSAA	Refugee Status Appeals Authority
UNHCR	United Nations High Commissioner for Refugees

NOTE ON PAGE NUMBERS AND FOOTNOTES

Page numbers run consecutively from the beginning of the text to the end of the appendices. Footnotes run in one series for the text, but each appendix has its own series of footnotes.

ACKNOWLEDGEMENTS

Thanks to my colleagues at the Department of Labour, in particular Graeme Buchanan, Office Solicitor and Maya Ameratunga, Refugee Status Section, for their assistance and to Dr G D S Taylor for his helpful advice.

I THE GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES

A *Summary of the Contents of the Convention*

The 1951 Convention Relating to the Status of Refugees¹ defines who is a refugee² and requires contracting states to accord certain limited rights to those who are granted or those who claim refugee status. The most important of these rights is the right not to be returned (*refoulé*) to a place where the life or freedom of the refugee would be threatened³. The Convention is not enforceable in international law by individual refugees⁴.

The obligations of contracting states towards refugees include the duty not to discriminate against refugees on the grounds of race, religion or country of origin⁵. Article 16 guarantees the right of access to the courts and legal assistance. Other provisions⁶ guarantee rights to paid employment and coverage by labour legislation and social security, and to housing, education and public relief⁷. Articles 25, 27 and 28 provide for the issue of identity papers, travel documents and other necessary documentation to refugees.

Article 31(1) provides that

Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened ..., enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Article 31(2) prohibits Contracting States from restricting the movements of refugees, "other than those which are necessary ... and ... until their status in the country is regularized or they obtain admission into another country". Article 32(1) provides that "Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order". Such expulsion "shall be only in pursuance of a decision reached in accordance with due process of law". Article 32 applies only to

¹ Opened to signature 28 July 1951, 189 UNTS 150; in this paper referred to as "the Convention" or "the 1951 Convention" or "the Refugee Convention".

² Article 1A(2).

³ Article 33(1). The extent of the obligation of *non-refoulement* is considered in Part II below.

⁴ G S Goodwin-Gill *The Refugee in International Law* (1983) 134, (hereafter Goodwin-Gill (1983)).

⁵ Articles 3 and 4.

⁶ Articles 17 - 19.

⁷ Articles 21 - 23.

refugees lawfully in the territory of the receiving state, while article 33, *Prohibition of Expulsion or Return (Refoulement)*, applies to all refugees.

B *The Convention Definition of Refugee*

The Convention defines a refugee as:⁸

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

Refugee status, once acquired, can be lost in the circumstances set out in Article 1C of the Convention, for example if a refugee voluntarily re-avails herself of the protection of the country of her nationality⁹ or if she "can no longer, because the circumstances in connection with which she has been recognized as a refugee have ceased to exist, continue to refuse to avail [herself] of the protection of the country of [her] nationality"¹⁰. The Convention does not apply to persons (specified in Article 1F) who have committed crimes against peace or crimes against humanity, or who have been guilty of acts contrary to the purposes and principles of the United Nations. Nor does the Convention cover refugees receiving assistance from United Nations agencies other than the United Nations High Commissioner for Refugees ("UNHCR")¹¹.

Prior to the First World War, there was little need for a legal definition of "refugee". Numbers of refugees were small and immigration was relatively unrestricted. The large numbers of refugees created by World War I coincided with a rise in political nationalism and the adoption by Western nations of restrictive immigration policies. The need to cope with large numbers of European refugees required an exception to be made

⁸ Above n 2. The Convention when first adopted applied only where refuge was sought as a result of events occurring before 1 January 1951. State parties also had the option of limiting coverage to events which had occurred in Europe, thus excluding refugees from other parts of the world. The 1967 New York Protocol relating to the Status of Refugees (done 31 January 1967, 606 UNTS 267) removed these temporal and geographical restrictions (while saving existing declarations limiting state obligations to Europe).

⁹ Art 1C(1).

¹⁰ Art 1C(5) and (6).

¹¹ (Art 1D), for example Palestinian refugees receiving assistance from UNWRA (the United Nations Relief and Works Agency). UNWRA operates in Jordan, Syria, Lebanon, and the Gaza Strip. Palestinians outside the area of UNWRA operation may qualify as Convention refugees.

to these restrictive policies. This, in turn, required some means of defining who was a refugee¹².

International instruments relating to refugees prior to the Second World War applied principles of humanitarian law to specific named groups of refugees who lacked de jure protection (for example "Russian refugees" or "Armenian refugees" who did not enjoy the protection of the Governments of the Soviet Union or Turkey respectively)¹³.

The 1951 Convention was drafted at the height of the Cold War. The Convention definition of refugee is based not on membership of a group affected by armed conflict or violence, but on individualised fear of persecution where the human rights of the individual are not respected by the country of origin. The definition focuses on civil and political rights rather than economic, social and cultural rights. In 1951, this definition fitted the "conviction of most Western states that their limited resettlement capacity should be reserved for those whose flight was motivated by pro-Western political values"¹⁴.

Groups of refugees fleeing civil war or violence but who are not threatened with persecution as such are not covered by the Convention (although they may be entitled to the protection of international humanitarian law)¹⁵. These "humanitarian refugees", who now comprise the majority of the world's displaced peoples¹⁶, are nevertheless assisted through the office of the United Nations High Commissioner for Refugees ("UNHCR") along with "Convention refugees" and may be granted temporary or permanent refuge by receiving states on humanitarian grounds¹⁷.

¹² J C Hathaway "The Evolution of Refugee Status in International Law: 1920 - 1950" (1984) 33 ICLQ 348 (hereafter Hathaway (1984)).

¹³ Above, 354 - 355.

¹⁴ J C Hathaway "A Reconsideration of the Underlying Basis of Refugee Law" (1990) Harv Int'l LJ 129, 148.

¹⁵ G Melander "The Two Refugee Definitions" in *Report No 4 of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law* (1987) 17.

¹⁶ K Hailbronner "Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?" (1986) 26 Va J Int'l L 858 n 2. There are more than 17 million displaced persons under UNHCR care: Report of the Forty-Second Session of the Executive Committee of the High Commissioner's Programme, 21 October 1991, UN Doc A/AC.96/783, Opening Statement of the High Commissioner, 21. Most are in the third world (Report of the Forty-First Session of the Executive Committee of the High Commissioner's Programme, 10 October 1990, UN Doc A/AC.96/760, para 3 p1) and most are women or girls: (J C Hathaway *The Law of Refugee Status* (1991) (v)); hereafter, Hathaway, *Law of Refugee Status*). In recognition of this and following Hathaway's practice, the feminine pronoun is used in this research paper.

¹⁷ Goodwin-Gill (1983), above n 4, 11.

Many commentators consider that the Convention is an inadequate basis for international refugee law.

Some view the Convention as outdated and perceive that it is being used in ways which were never intended¹⁸. Since 1951, when the Convention was drafted, previous natural barriers to movement such as the distance of Third World refugees from the countries of the developed world have been overcome with cheap and available air travel. The no-exit policies of Eastern Europe (which limited the numbers of refugees arriving in the West) have disappeared. It is argued that refugee bona fides were once taken for granted on the basis that anyone willing to face the deprivations of a refugee camp must face even worse conditions at home. It is also argued that refugees who reach European states or other developed countries are possibly privileged compared to those in camps or otherwise displaced, since they have the money to pay for escape¹⁹.

Other commentators²⁰ criticise the Convention system because the protection system which it establishes is not even-handed. European refugees are routinely assisted by UNHCR to find asylum including third state resettlement, while third world refugees are contained within the third world by return, local resettlement and confinement in refugee camps. The Convention is defective, too, because the assessment of refugeehood as dependent on "persecution" is inherently subjective and politically malleable, depending on the receiving state's relationship with the state of origin²¹. Nor does the Convention challenge the behaviour of states which produce refugee flows through the abuse of human rights²².

Many voluntary agencies engaged in assisting refugees in camps and detention centres around the world wish to see a new Convention which expands the rights of refugees and

¹⁸ Melander, above n 15, 10 - 11.

¹⁹ D A Martin "The New Asylum Seekers" in D A Martin (ed) *The New Asylum Seekers: Refugee Law in the 1980s* (1988) 8 - 11 (hereafter, *Martin Asylum Seekers*).

²⁰ J C Hathaway "Reconceiving Refugee Law as Human Rights Protection" (1991) Vol 4 No 2 *Journal of Refugee Studies* 113, 114 - 115.

²¹ Regarding the reluctance of New Zealand to grant refugee status to a refugee from India, see *Benipal v Ministers of Foreign Affairs and Immigration* (Unreported, 26 November 1985, High Court, Auckland Registry, Chilwell J, A 878/83, A 993/83, A 1016/83) 140 - 141, 151 - 153.

²² J K Garvey "The New Asylum Seekers: Addressing Their Origin" in *Martin Asylum Seekers* 181. See also the *Draft Declaration of Principles of International Law on Compensation to Refugees* (International Law Association, 65th Conference, Cairo, April 1992).

the definition of refugee²³. Others fear that the process of developing a new Convention could lead to a more restrictive policy²⁴:

[A]lthough the present position concerning the definition of the term 'refugee' is analytically untidy, in practice flexibility and pragmatism have been exercised to alleviate the suffering of the uprooted. These benefits might be lost in any attempt to define more accurately those who are entitled to refuge or permanent asylum. However, if the current definition of refugees is maintained, the receiving countries must accept the responsibility of developing more constructive refugee policies, both at home and abroad.

Despite these criticisms and the limitations of the Convention in protecting both refugees and state sovereignty, it seems unlikely that the Convention will be changed in the foreseeable future²⁵.

C *Refugee Status Determination Procedures*

The Convention and Protocol do not specify the procedures to be followed in determining whether a person is a Convention refugee. However, inferences can be drawn from the wording of the Convention and Protocol, the UNHCR Executive Committee conclusions, and the practice of states. States are obliged to establish a procedure to determine whether a person is a Convention refugee²⁶. This:²⁷

follows from a straightforward reading of the Convention, from accepted principles of treaty interpretation, and from the rule *pacta sunt servanda*²⁸. The purpose of the Convention is the protection of refugees, in particular to protect them against *refoulement*. It follows that the beneficiaries of protection - the refugees defined in Article 1 - must first be identified.

The determination procedure adopted must be suited to the purpose of the Convention. An interpretation of the Refugee Convention in good faith, according to Article 31(1) of the Vienna Convention on the Law of Treaties, "entails the result that Contracting States

²³ YMCA *Refugee Crisis and Response. Report of the World YMCA Workshop on Root Causes of Refugees and Displaced Persons* (1991); Report of the Forty-Second Session of the Executive Committee of the High Commissioner's Programme, 21 October 1991, UN Doc A/AC.96/783, para 6 p1.

²⁴ *Refugees: The Dynamics of Displacement. A Report for the Independent Commission on International Humanitarian Issues* (1986) 47.

²⁵ Comment by R G P Haines, Member of the Refugee Status Appeals Authority, at a seminar on Refugee Law organised by the Auckland Institute of Technology Refugee Education Programme, Auckland, 8 June 1992.

²⁶ UNHCR *Handbook on Procedures and Criteria For Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1988) HCR/IP/4/ Eng Rev 1) para 189, p 45 (hereafter, *UNHCR Handbook*).

²⁷ R Plender "The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research" in *The Right to Asylum* (Hague Academy of International Law (1989)) 82 - 83 (hereafter *Plender Asylum*).

²⁸ "Pacts are binding".

are obliged to make it effective, at least as regards its central purpose"²⁹. The requirement to establish determination procedures is also part of a contracting state's undertaking to co-operate with the office of UNHCR in the exercise of its functions. States must "facilitate [UNHCR's] duty of supervising the application of the provisions of this Convention"³⁰.

In 1977, the Executive Committee of the High Commissioner's Programme adopted a set of basic guidelines³¹ which refugee determination procedures should satisfy. While UNHCR guidelines are not directly legally binding upon New Zealand judicial bodies, they are "of considerable persuasive authority"³². The New Zealand procedures, described in Part IIA2 below, comply with these basic requirements.

D The Obligation of Non-Refoulement

1 Article 33: the prohibition against refoulement

The 1951 Convention does not oblige contracting states to grant asylum, in the sense of permanent, safe refuge, to those who seek it, although article 14(1) of the Universal Declaration of Human Rights 1948³³ proclaims that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution". Legally, the right to asylum remains the right of the receiving state to grant refuge³⁴.

Nevertheless, the Refugee Convention constrains the ability of a contracting state to return a refugee to a territory where she may be persecuted. Article 33 states:

- (1) 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.
- (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or

²⁹ Plender *Asylum* 83.

³⁰ Article 35 of the Convention and article II of the 1967 Protocol. Under these provisions, contracting States agree to make reports regarding the situation of refugees, the implementation of the Convention and laws and regulations which are in force relating to refugees.

³¹ Attached as Appendix 1.

³² *Refugee Appeal No 1/92 Re SA*, 30 April 1992, Refugee Status Appeals Authority, 33. What are generally referred to as "Excom Conclusions" are "sound in substance and consonant with the letter and the humanitarian spirit of both the 1951 Convention and other binding instruments relating to refugees in particular, and to human rights in general. Moreover, the Conclusions represent collective international expertise in refugee matters, including legal expertise": 32.

³³ UN Doc A/811.

³⁴ P Hyndman "Refugees Under International Law with a Reference to the Concept of Asylum" (1986) 60 ALJ 148, 153 (hereafter, Hyndman "Concept of Asylum").

who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The nature and extent of the obligation of *non-refoulement* under the Convention is not entirely clear. This section considers the interpretation of article 33(1) of the Convention, and discusses at what point and to what extent a state is obliged to respect the obligation. It is clear, however³⁵, that the obligation of *non-refoulement* is an active duty to take steps to ensure that refugees are not returned to a place where they may be persecuted, not just a passive duty to refrain from returning a refugee should the opportunity arise.

Non-refoulement "is a term of art covering, in particular, summary reconduction to the frontier of those discovered to have entered illegally and summary refusal of admission of those without valid papers"³⁶. The obligation is owed to refugees regardless of their legal status under the municipal immigration laws of the receiving state³⁷.

2 Does article 33 apply to all Convention refugees?

The plain words of article 33 support a broad interpretation of the duty of *non-refoulement*. Article 33(1) prohibits the return of refugee "in any manner whatsoever". This indicates an intention on the part of those who drafted the article that the duty of *non-refoulement* is not to be narrowly applied but should be taken to prohibit return to the state of origin in all circumstances where persecution may result. The use of the plural "frontiers of territories" extends the obligation to include a prohibition against return to any territory where persecution may occur.

However, the category of persons protected against *refoulement* by article 33 is defined in a slightly different, and arguably narrower, way to those defined as refugees in article 1A(2). A refugee is someone with a well-founded fear of persecution. The "well-founded fear" test is now widely³⁸ accepted to be that of a real chance or reasonable

³⁵ G S Goodwin-Gill "Non-Refoulement and the New Asylum Seekers" (1986) 26 Va J Int'l L 898, 902 - 903 (hereafter, Goodwin-Gill "Non-Refoulement").

³⁶ Goodwin-Gill (1983) 69. "Refoulement may be defined as an administrative act, regulated as to its exercise by rules of international law, whereby the authorities ... refuse to admit a particular person to the State's territory, and thereupon return him to the country whence he came": Plender *International Migration Law* (2 ed, 1988) 425 (hereafter, Plender (1988)).

³⁷ Goodwin-Gill, above, 83. See also Hathaway *Law of Refugee Status* 50. Compare article 32, "Expulsion", in which the prohibition against expulsion applies only to refugees "lawfully in [the] territory" of contracting States. See J Crawford and P Hyndman "Three Heresies in the Application of the Refugee Convention" (1989) 1 IJRL 155, 176.

³⁸ *Refugee Appeal No 1/91 Re TLY* and *Refugee Appeal No 2/91 Re LAB*, 11 July 1991, Refugee Status Appeals Authority, 7. See also *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379;

degree of likelihood that persecution will occur. The chance of persecution may be as low as 10 percent³⁹. Nevertheless, the refugee applicant is to be given the benefit of the doubt⁴⁰.

The duty of *non-refoulement*, on the other hand, is owed to those whose "life or freedom would be threatened" if they were returned to the country of origin. This may be a somewhat narrower group than those persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion⁴¹. The words "would be threatened" may impose a requirement to show that such threats are "more likely than not" to occur⁴².

This could be a more difficult test for a refugee to meet than showing a well-founded fear of persecution. If applied, it could theoretically lead to a receiving state granting refugee status because there was a real chance of persecution, but refusing to protect the refugee against *refoulement* because the risk that persecution *would* occur was not sufficiently great. However, it appears that State parties to the Convention have not relied on the narrow interpretation as a means of reducing the numbers of asylum seekers reaching their borders. Other methods have been used⁴³.

There may also be a distinction between "persecution" and "threats to life and freedom"⁴⁴. "Threats to life and freedom" could arguably be a narrower, more severe subset of the broader term "persecution". In my opinion, however, the word "freedom" as used in article 33 in a broad sense to mean not just physical liberty, but also freedom of thought, opinion and expression⁴⁵. It could also be read to include those types of

Immigration and Naturalisation Service v Cardoza-Fonseca (1987) 94 L Ed 2d 434; *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] AC 958.

³⁹ *Chan*, above, per McHugh J, 429.

⁴⁰ Haines, above n 25.

⁴¹ M Fullerton "Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights" (1988) 29 Va J Int'l L 35, 100 - 101.

⁴² The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/39/51 (1984) also contains a prohibition against *refoulement* which applies "where there are substantial grounds for believing that [a person] would be in danger of being subjected to torture". The prohibition on *refoulement* in the Torture Convention applies to all persons, not just to refugees. Hence "humanitarian refugees" are also protected. The "substantial grounds" test is also contained in the 1950 European Convention for the Protection of Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, Nov 4 1950, 213 UNTS 222). Article 4 of Protocol No 4 of 1968 (R Lillich (ed) *International Human Rights Instruments* 510.4) prohibits the collective expulsion of aliens where expulsion would violate their right to protection from torture and degrading treatment and/or their right to respect for family life.

⁴³ Fullerton, 94 - 114.

⁴⁴ Above, 101.

⁴⁵ The International Covenant on Civil and Political Rights (UN Doc A/6316 (1966)), arts 18 and 19, recognises these rights.

persecution which affect freedom in a broad sense, for example deprivation of access to basic educational facilities or prosecution for giving "illegal" religious instruction to a child. Given that the central purpose of the Refugee Convention is to enable those persecuted to escape persecution, the concept of persecution and "threats to life and freedom" should be taken as having the same meaning. A narrower interpretation would result in the purpose of the Convention being defeated.

The differences in wording between the definition of refugee in article 1A(2) and the *non-refoulement* obligation in article 33(1) are probably of little practical importance. If a state is obliged to consider a claim for refugee status, and grants refugee status, it is hardly likely to return a refugee because she will suffer "only" persecution rather than a threat to life or freedom. A narrower interpretation would not be consistent with the obligation of contracting states to make treaties effective, would undermine the whole Convention, and would not, therefore, be an interpretation in good faith⁴⁶. The practicalities of refugee determination also make it highly unlikely that state parties would attempt to apply different standards of proof to the determination process and the obligation of *non-refoulement*.

If refugee status is not recognised, a refugee who has already entered the country will have access to the domestic courts to enforce any substantive or procedural rights accorded to her under domestic law. Removal will have to be effected in accordance with domestic immigration laws. At the border, however, non-recognition will lead in many cases to *refoulement*. If *refoulement* does take place, there is no effective enforcement procedure under the Convention for an aggrieved refugee, who is a beneficiary of but not a party to the Convention⁴⁷.

While the Refugee Convention provides for states parties to take disputes to the International Court of Justice⁴⁸, in practice this never happens⁴⁹. UNHCR intervention to protect an individual refugee may occur (but is rare). The only effective remedies available to a refugee for violations of the provisions of the Convention are those

⁴⁶ G Stenberg *Non-Expulsion and Non-Refoulement* (1989) 219, points out that the more restrictive concept of persecution "would mean that a refugee could be returned to a country of persecution even if the conditions of Article 33(2) were not fulfilled. This would put into question the whole existence of the 1951 Convention and, indeed, also that of the system of international protection of refugees as such, rendering it almost totally meaningless". Stenberg also points out, 218 - 219, that the drafting history of article 33 supports the broad interpretation.

⁴⁷ A fortunate refugee may be assisted by prompt political action on the part of a non-governmental organisation, in the unlikely event that the organisation hears of the possible *refoulement* in time.

⁴⁸ Article 38.

⁴⁹ Fullerton 104 - 105 advises that "[e]ach signatory is reluctant to criticize other signatories for fear that its own refugee practices will, in turn, be criticized".

available in the domestic courts of the country of refuge⁵⁰. The fate of those refugees who do not gain access to those courts and are subject to *refoulement* for obvious reasons tends not to be known⁵¹.

3 *When does a refugee become a refugee?*

It has been argued⁵² that refugees do not acquire rights under the Convention until they have been determined to be refugees by the authorities of the receiving state. The obligation of *non-refoulement* would therefore not apply unless the authorities of the receiving state granted refugee status to a refugee applicant.

The UNHCR *Handbook*, on the other hand, states that:⁵³

[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

This view is widely accepted as correct:⁵⁴

It is not a government's acknowledgement of one's predicament that makes that individual a refugee. Rather, it is the actual facts of his life - his well-founded fear of persecution ... that make him a refugee. It is true that all asylum-seekers do not qualify as refugees; yet some asylum-seekers *are* refugees. Therefore, governments that turn away all or most asylum-seekers will likely turn away some refugees and violate Article 33.

It can now be regarded as settled that the obligations of contracting states are owed to all those within their territory who claim refugee status as soon as refugee status is claimed. Those obligations cease to be owed to those who are subsequently determined not to be refugees within the Convention definition⁵⁵.

⁵⁰ Lawyers Committee for Human Rights *The Human Rights of Refugees and Displaced Persons: Protections Afforded Refugees, Asylum Seekers and Displaced Persons under International Human Rights, Humanitarian and Refugee Law* (1991) 8.

⁵¹ Crawford and Hyndman, above n 37, 168 (Mr Azemoudeh).

⁵² See Fullerton 98 - 99. In *Benipal*, above n 21, 262, it was argued that once refugee status is recognised, the Convention affords protection to refugees, but that there is no protection prior to the recognition of refugee status. Hence at the application stage there was a need for protection under municipal law. Chilwell J made no finding on this submission, which is wrong.

⁵³ Above n 26, 9.

⁵⁴ Fullerton 98 - 99. See also Hyndman "Concept of Asylum" 151; Goodwin-Gill (1983) 73; and Goodwin-Gill "*Non-Refoulement*" 902.

⁵⁵ Hathaway *Law of Refugee Status* 189 - 229.

4 Manifestly unfounded claims

Some parties to the Refugee Convention have introduced "fast-track" screening procedures which authorise border officials to return, or "turn around", asylum-seekers with "manifestly unfounded claims"⁵⁶. "Manifestly unfounded" or "clearly abusive" applications are those which are clearly fraudulent or not related to the criteria for the granting of refugee status⁵⁷. In 1983, UNHCR recognised that:⁵⁸

national procedures for the determination of refugee status may usefully include special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure.

The Executive Committee recommended that procedural safeguards be applied when assessing whether claims were abusive. These recommendations included⁵⁹ the giving of a complete personal interview by a fully-qualified official (whenever possible by an official of the authority competent to determine refugee status); the establishment of the manifestly unfounded or abusive character of an application by the authority normally competent to determine refugee status; and allowing an unsuccessful applicant a right of appeal before rejection at the frontier or forcible removal from the territory.

Those who submit abusive requests for asylum are "migrants who have to be handled within a refugee context because they have chosen to circumvent immigration policies and immigration rules by alleging fear of persecution"⁶⁰. A decision on a "manifestly unfounded claim" is nonetheless a substantive determination of refugee status⁶¹. Domestic laws or procedures which result in *refoulement* of bona fide refugees because of "fast track" border determinations may be "so procedurally deficient that they run afoul of the Article 33 duty to refrain from returning refugees to persecution"⁶². The obligation of *non-refoulement* does not, therefore, allow a less rigorous determination procedure to apply where claims may appear to be manifestly unfounded.

⁵⁶ See Fullerton regarding procedures in Belgium and the Netherlands.

⁵⁷ Report on the Thirty-Fourth Session of the Executive Committee of the High Commissioner's Programme, 20 October 1983, (UN Doc A/AC.96/631), Conclusion No 2, "The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum", 24.

⁵⁸ Above, para (d), 25.

⁵⁹ Above, para (e). Fullerton, 46, notes that the Belgian Minister of Justice may turn away applicants for refugee status who lack proper travel documents where a refugee claim is manifestly unfounded. Fullerton says this is "vague and broad" and confers great power on the police at the border.

⁶⁰ G Jaeger "Irregular Movements: The Concept and Possible Solutions" in *Martin Asylum Seekers* 23, 26.

⁶¹ Above n 57, para (e).

⁶² Fullerton, 96.

5 *Is rejection at the frontier refoulement?*

The obligation of *non-refoulement* applies to all refugees who apply for refugee status once they have entered the country of refuge. There is no duty on states to grant permanent asylum to refugee applicants⁶³. However, a state may not return a refugee to a country where she is likely to face threats to her life or freedom without breaching the Convention⁶⁴. The receiving state therefore has only two alternatives; to admit the applicant (although not necessarily on a permanent basis) or to send her to a third country where she will not face persecution.

In New Zealand, a refugee enters New Zealand as soon as she physically passes New Zealand's territorial boundaries⁶⁵. Although a refugee applicant may be taken into custody for security reasons⁶⁶, entry is not refused. Under section 4 of the Immigration Act 1987, if an applicant does not have a temporary permit, she will be present in New Zealand unlawfully for the purposes of that Act⁶⁷. Nevertheless, she will still be present, as a matter of law, in New Zealand.

Some parties to the Refugee Convention refuse refugee applicants access to the determination procedure by denying the applicant legal entry to the country, even though physical entry has taken place and even though the applicant may be taken into custody and held in a detention centre⁶⁸. New Zealand does not subscribe to this legal fiction which, in the case of the Refugee Convention, is in breach of the general obligation to implement the provisions of the Convention in good faith⁶⁹.

If the term *refoulement* bears a broad meaning⁷⁰, prohibiting return "in any manner", then protection against return extends to all those who present themselves at the frontier, regardless of whether they have reached the "other side" of immigration or customs controls. However, some commentators have argued that *refoulement* does not cover "rejection at the frontier" and that "turnaround" without entry is not in breach of the

⁶³ R Plender (1988) 415.

⁶⁴ M den Hond "'Jet-Age Refugees': In Search of Balance and Cooperation" in *Martin Asylum Seekers* 49, 53.

⁶⁵ "New Zealand" is defined for immigration purposes in s 2 of the Immigration Act 1987.

⁶⁶ Immigration Act 1987 s 128B.

⁶⁷ See Part II C below.

⁶⁸ In *Gunaleela v Minister for Immigration and Ethnic Affairs* (1987) 74 ALR 263 it was held that persons who do not hold a permit to enter Australia and arrive at an airport which they do not leave (unless for the purpose of being kept in custody under the Migration Act 1958 (Cth) ss 5(2), 36A(8)) have not entered Australia. The Immigration Act (UK) 1971 s 3(1) also maintains this legal fiction.

⁶⁹ Vienna Convention on the Law of Treaties (done 23 May 1969, 8 ILM (1969) 679), art 31(1)). See also Goodwin-Gill (1983) 77 - 78; Fullerton, 99 - 100; Crawford and Hyndman, above n 37, 177.

⁷⁰ As I have argued in Part I D2 above.

Refugee Convention⁷¹. However, most legal authorities do not agree that states may return persons applying for refugee status at the frontier⁷².

It is submitted that the obligation of *non-refoulement* includes the duty not to return any person who presents themselves to the immigration authorities on arrival and either directly or indirectly requests refugee status. This is so firstly because refugee status is claimed when the refugee no longer enjoys the protection of the country of origin. In international law, then, once a refugee has left the country of origin, that country loses jurisdiction over the refugee. The only state which may then exercise jurisdiction over the refugee is the country of refuge. That state is obliged to offer protection against *refoulement* to refugees whether or not it is a party to the Convention⁷³.

Secondly, the term *refouler* is a specific legal term used both in Belgium and France to denote police actions without formality which are applied to aliens who are in the country in an irregular manner (those who in New Zealand would be called "illegal immigrants") and who are turned back at the frontier (rather than formally removed, expelled or extradited). "Return" is a "broad non-technical term"⁷⁴ with a more extensive meaning than the concept of expulsion as used in articles 33 and 32. The use of the broad term "return" and the meaning of the technical term *refoulement* indicates that article 33 protects refugee applicants from actions such as rejection at the frontier or "turnaround".

Thirdly, a frequently-made point is that it would be illogical to provide protection against *refoulement* for those who illegally succeed in crossing a border, but to deny protection to those who legally present themselves at the border⁷⁵. Fourthly, the duty not to return in article 33 applies to all refugees, whether or not they are legally present in the country in which they seek refuge. The prohibition against expulsion contained in article 32, on the other hand, protects only refugees who are "lawfully in the territory". Article 33

⁷¹ Hailbronner, above n 16, 866 asserts that "the principle of non-refoulement has never been interpreted as excluding completely any possibility for police or immigration officers to return persons at the frontier if it appears that their applications for asylum would be unfounded".

⁷² See above n 73; Plender (1988) 427; see also A Grahl-Madsen *Territorial Asylum* (1980) 40, 74; Stenberg, above n 46, 176 - 178; Hyndman "Australian Immigration Law and Procedures Pertaining to the Admission of Refugees" (1988) 33 McGill LJ 717, 736.

⁷³ See Part III D below.

⁷⁴ Crawford and Hyndman, above n 37, 177.

⁷⁵ Hailbronner, above n 16, 862 n 22. P Weis, "Territorial Asylum" (1966) 6 Indian JIL 173, 183 states: "It should, however, be pointed out that if Article 33 read in conjunction with Article 31 is not taken to prohibit the return of refugees who present themselves at the frontier, this would mean that the extent to which a refugee is protected ... [against return to persecution] would depend on the fortuitous circumstance whether he has succeeded in penetrating the territory of a contracting State".

contains no such restriction, and therefore applies to all refugee applicants, even illegal entrants⁷⁶.

6 *Is the application of the "safe third country" (or the "country of first asylum") principle refoulement?*

Governments have also attempted to decline entry to refugee applicants on the basis that they are the responsibility of some other state⁷⁷. What began as an informal practice of returning refugees from countries of second or subsequent arrival to countries of "first asylum" has been refined and is now provided for in municipal and international treaty law⁷⁸.

Return to the country of first asylum may create several difficulties. It may lead to eventual *refoulement* of the refugee to the country of origin. It may put the refugee "into orbit"⁷⁹; this description is applied to refugees who are passed from one transit lounge in one country to another, with no country prepared to admit the refugee to its territories and take responsibility for determination of refugee status. The country of first asylum could also persecute the refugee or have a completely incompatible religion or culture.

The principle of responsibility of the country of first asylum has been stretched from the original principle that where a refugee had acquired refugee status in a country, or at least the protection of a state⁸⁰, that refugee should not be entitled to seek asylum subsequently in a third state and the third state should not be obliged to admit her. The principle is now applied in some states to exclude refugee applicants who have spent any time at all, even a matter of hours, in a third country *en route* from the country of origin.

⁷⁶ Applying ordinary principles of statutory interpretation. See also above n 46, 176.

⁷⁷ *R v Secretary of State ex p Muboyayi* [1991] 4 All ER 72 (CA). The country of first asylum principle is enshrined in the Refugee Act 1980 (US) (see Plender (1988) 425). Canada enacted the safe third country concept in 1988. The Canadian Cabinet may draw up a list of "safe third countries" to which refugee applicants may be returned if that state's "laws or practices" establish that they would be "allowed to return" to that country or that they would be able to have the merits of their claim determined there: Hathaway, "Postscript - Selective Concern: An Overview of Refugee Law In Canada" (1989) 33 McGill LJ 354. The "safe third country" list has never been drawn up in Canada (see *Refugee Appeal No 1/92*, above n 32, 21-22). The Refugee Status Appeals Authority noted that Canadian jurisprudence does not necessarily recognise the principle, 28.

⁷⁸ Plender (1988) 424. Article 3(5) of the Dublin Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities signed 15 June 1990, (30 ILM 425 (1991)) states: "Any Member State shall retain the right, pursuant to its national laws, to send an applicant for asylum to a third state, in compliance with the provisions of the Geneva Convention, as amended by the New York Protocol".

⁷⁹ Fullerton, 49 n 55; Plender (1988) 424.

⁸⁰ Goodwin-Gill (1983) 55 considers that such protection requires as a minimum, the right of residence and re-entry, the right to work, and some form of guarantee against return to a country of persecution.

In *R v Secretary of State for the Home Department, ex parte Muboyayi*, the applicants fled from Zaire to the United Kingdom via France. The Secretary of State refused to grant the family leave to enter, applying the "safe third country" principle:⁸¹

[A]n application for asylum from a passenger who has arrived in the UK from a country other than the country in which he fears persecution, will not normally be considered substantively. The passenger will be returned to the country from which he embarked, or to another country in which he has been since he left the country of feared persecution or, if appropriate, to his country of nationality, unless I am satisfied that the country is one in which his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, or that it would return him to such a country.

Even though Mr Muboyayi had been in France for only one day, the Court of Appeal refused to interfere with the Secretary of State's decision, because of the safe third country policy and the evidence that France would comply with the Convention in considering Mr Muboyayi's claim for asylum. However, in England the third country must be recognised as safe or the principle will not be applied⁸².

There has been much academic criticism of the principle that the state with the primary responsibility for determining refugee status is the country of first asylum. Crawford and Hyndman note⁸³ that:

[a]s a matter of comity, another State should not be presumed to be intending to violate its international obligations, but that is only a presumption. The primary responsibility is to the refugee, a responsibility which cannot be shuffled off by 'passing the buck' to a recalcitrant third State.

Hathaway criticises the "safe country" principle because no decision on the merits of the claim is made; situations in other countries can change rapidly (and safe country lists can quickly become outdated); the concept injects a political element into the refugee determination process; and because it puts in doubt a signatory's ability to comply with the Convention (in particular the duty of *non-refoulement*). Once a claimant has been sent on or sent back to a third country by the chosen country of refuge, the immigration authorities of that country cannot ensure that the life or liberty of any particular claimant is not at risk⁸⁴.

According to Hathaway the "universal scope of post-Protocol refugee law effectively allows most refugees to choose for themselves the country in which they will claim

⁸¹ Reply by the Home Secretary to a written question in the House of Commons, 25 July 1990, 177 HC Official Report (6th series), above n 78, 83.

⁸² *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 (HL).

⁸³ Above n 37, 173.

⁸⁴ J C Hathaway "Selective Concern: An Overview of Refugee Law in Canada" (1988) 33 McGill LJ 676, 703 - 708 and Hathaway *Law of Refugee Status* 46 - 50.

refugee status"⁸⁵. This statement has particular relevance in the Asia/Oceania region, where, apart from New Zealand and Australia, few countries are parties to the Refugee Convention⁸⁶. The chances of finding a "safe third country", particularly one in which the culture and religion are compatible with that of the refugee, are therefore limited.

⁸⁵ Above 46.

⁸⁶ UNHCR *Handbook*, above n 26, 86 - 87.

II NEW ZEALAND'S DOMESTIC LAW RELATING TO REFUGEES

A *The Refugee Status Determination Procedure*

1 *History*

In 1978 procedures⁸⁷ were set up under Crown prerogative to ensure that New Zealand complied with its obligations as a party to the Refugee Convention⁸⁸. This was done at the instigation of the Legal Division of the Ministry of Foreign Affairs⁸⁹ in consultation with UNHCR.

Under these procedures⁹⁰, individual applicants for refugee status made application directly to the Legal Division of the Ministry of Foreign Affairs. The Ministry made an initial determination as to whether the applicant was a Convention refugee. Applicants then appeared personally before an Interdepartmental Committee on Refugees ("ICOR"), along with counsel if they wished, to present their case and answer questions. ICOR⁹¹ then made a recommendation to the Ministers of Foreign Affairs and Immigration, who made the final decision. The UNHCR representative for New Zealand (based in Canberra), was entitled to attend ICOR hearings as an observer, and applicants were advised of their right to contact the UNHCR representative if they wished.

In practice, those recognised as refugees were granted residence status⁹². For unsuccessful applicants there was no appeal provision apart from a general right of appeal to the Minister of Immigration against deportation "on humanitarian grounds" under section 20A of the Immigration Act 1964, or to the Deportation Review Tribunal under sections 22C and D of that Act. Applications for review were also possible⁹³.

⁸⁷ These procedures were detailed in interdepartmental circular letters dated 6 September 1978 and 11 March 1981 and a statement of the procedures was sent to UNHCR on 7 September 1981.

⁸⁸ The history of the setting up of these procedures is related in Benipal, above n 21, 47 - 51.

⁸⁹ Now the Ministry of External Relations and Trade (MERT).

⁹⁰ Summarised in G S Goodwin-Gill *The Refugee in International Law* (1983) 180 - 182.

⁹¹ ICOR included representatives of the Departments of Labour (Immigration) and Internal Affairs, the Police Department and the Security Intelligence Service, and was chaired by the Head of the Legal Division of Foreign Affairs.

⁹² Benipal, above n 21, 51.

⁹³ Above, 48. In circumstances where a person had been convicted of an offence under the Immigration Act 1964, and was therefore liable to be deported, a petition to the Governor-General to apply the prerogative of mercy could lead to a stay of deportation.

Numbers of refugee applicants were low until 1987, when they began to rise rapidly⁹⁴. In 1990, Cabinet decided to constitute a new determination procedure administered by the New Zealand Immigration Service ("NZIS") rather than as a foreign affairs concern⁹⁵.

2 *Current procedures*⁹⁶

(a) Application for refugee status

About two-thirds of refugee applicants arrive in New Zealand lawfully in terms of local immigration laws and subsequently make application for refugee status (for example following a political or military upheaval in the home country subsequent to arrival⁹⁷). Statistically, this group is less likely to be recognised as refugees than those who claim refugee status at the border.

Refugee applicants arriving at Auckland airport⁹⁸ first come into contact with an immigration, customs or police officer. Once the applicant indicates that her arrival is "refugee-based", either by directly indicating a desire to claim refugee status or indirectly disclosing a fear of persecution in the country of origin, the officer is obliged to call in the duty immigration officer at the airport. An interview is held immediately. The applicant is granted a 30-day visitor's permit and is told to lodge a formal application for refugee status within that time⁹⁹.

⁹⁴ An average of 10 individual applications for refugee status was received each year in New Zealand from 1979 to 1981: see Goodwin-Gill (1983) 181. In 1987 27 applications were made. By 1990, approximately 1200 applications were made: see "Report to the Rt Hon W F Birch, Minister of Immigration, on the Process of Refugee Determination", W M Wilson, 29 April 1992 (hereafter, "the Wilson Report").

⁹⁵ According to the Wilson report, 10, the reasons for this were:

- (a) With rising numbers of refugees, the ICOR system became overloaded and a more efficient, less cumbersome determination procedure was needed.
- (b) It shifted the bulk of determination work from a largely policy advisory department - MERT - to a department whose main function is to process claims similar to those of refugee applicants.
- (c) It was unfair that the Government was the sole arbiter of refugee status, and the Government wished to provide for an independent appeal body.

⁹⁶ Where not otherwise sourced, information about these procedures was provided by Ms Maya Ameratunga, Refugee Status Section, NZIS. Any errors are mine.

⁹⁷ Many applications for refugee status were received after the pro-democracy demonstrations in the People's Republic of China in 1989.

⁹⁸ The vast majority of border claimants arrive at Auckland airport. A small number of border claimants arrive in other ways; for example, there is a steady trickle of ship-jumpers.

⁹⁹ The immigration officer then contacts the Refugee and Migrant Service, a private organisation which receives some government funding, which assists refugee applicants in finding accommodation, getting legal advice, and finding work. Refugee applicants are issued with work permits by NZIS. However, those refugee applicants who cannot find work are entitled to claim a social welfare benefit: Social Security Act 1964 s 74A(1).

(b) Initial determination by Refugee Status Section

Under section 19(1)(j) of the Legal Services Act 1991, refugee applicants are not entitled to legal aid to get a lawyer to assist in preparing applications and to represent the applicant at the RSS interview (although legal aid is available for appeals to the RSAA)¹⁰⁰. Following the interview, the RSS officer prepares a comprehensive report and makes a provisional recommendation. The applicant is invited to comment on the report before the final decision is made.

The applicant is accorded refugee status in approximately 25 percent of cases. A residence permit is usually then granted. A further 25 percent of cases lodged before 18 November 1991 are not granted refugee status but are granted residence on general humanitarian grounds under the humanitarian category of immigration policy current prior to that date. For applications lodged after 18 November 1991, the number of "humanitarian" acceptances is likely to fall dramatically, since the humanitarian policy in force after that date is extremely narrow¹⁰¹.

(c) Right of appeal

Applicants whose claims to refugee status are rejected by a RSS officer may appeal to the Refugee Status Appeals Authority established by Cabinet decision on 11 March 1991¹⁰². The Terms of Reference of the RSAA were amended with effect from 1 April 1992¹⁰³. A UNHCR representative may sit on hearings as a non-voting participant. The Authority's function is:¹⁰⁴

to make a final determination on appeal from decisions of officers of the Refugee Status Section of the New Zealand Immigration Service of claims to refugee status, that is, to determine whether persons are refugees within the meaning of Article 1, Section A(2) of the 1951 Convention

¹⁰⁰ The Wilson report, above n 94, 11, states that the effect of this exclusion from legal aid results in a great deal more work for RSS officers "because they will be required to draw out from the applicant much material which would previously have been extracted by the lawyer acting for the applicant and place before the Immigration Service in a readily intelligible form. Officers will also face the difficulty which is inherent in combining the roles of assisting the applicant and then adjudicating on his or her application".

¹⁰¹ Humanitarian applicants for residence in New Zealand will now be accepted only if they already have a "close family member who is a New Zealand citizen or a New Zealand resident": Department of Labour (NZIS) *Manual of Immigration Instructions* Chapter 7 (Residence) 7-H-1 - 7-H-8 November 1991, (hereafter, *NZIS Manual*). Many refugees will not meet this requirement.

¹⁰² A Refugee Status Appeals Committee was established, along with the RSS, on 17 December 1990 (see above n 100); it was renamed the RSAA on 11 March 1991 (CAB (91) M 9/14).

¹⁰³ The current Terms of Reference are attached as Appendix 2. Cabinet agreed on 16 December 1991 (CAB (91) M 52/72) to allow the Minister to amend some of the procedural aspects of the Terms of Reference without further reference to Cabinet. The Minister approved new Terms of Reference on 18 March 1992.

¹⁰⁴ Terms of Reference para 5.

Relating to the Status of Refugees, as supplemented by the 1967 Protocol Relating to the Status of Refugees.

The Appeal Authority does not have jurisdiction:¹⁰⁵

to consider whether, in respect of claimants who are not refugees within the [Convention definition], there exist any humanitarian or other circumstances which could lead to the grant of a residence or other permit to remain in New Zealand.

Appeals are by way of de novo hearing¹⁰⁶ "unless the claim is prima facie manifestly unfounded or frivolous or vexatious, or manifestly well-founded"¹⁰⁷. The proceedings are confidential to protect the interests of appellants.

The RSAA adopts an inquisitorial procedure; the Authority considers that an adversarial hearing, with the appellant on one side and the NZIS on the other, is inappropriate for refugee appeals¹⁰⁸. The formal rules of evidence do not apply. Cross-examination is allowed only by leave of the Authority, although the Authority considers that its questioning of the appellant is as rigorous as, and in many cases more rigorous than, cross-examination¹⁰⁹. The appellant is entitled to an interpreter, and to have her representative present.

The Authority must issue a written decision with reasons¹¹⁰. If the Authority cannot agree, the appellant is granted refugee status. Initially, the Minister of Immigration could overturn a decision of the Authority in "exceptional cases"¹¹¹, but the Minister has now agreed that the Authority's decision is final¹¹². Approximately 28 percent of appeals are successful. This is an average rate of success for appeal-level cases¹¹³. While this figure has been used to provide evidence of the high numbers of unfounded claims, it means that one in four determinations by the RSS are incorrect¹¹⁴.

¹⁰⁵ Above, although Refugee Status Section officers may do so.

¹⁰⁶ Refugee Status Appeals Authority Practice Note No 1 issued 2 July 1991, para 1.

¹⁰⁷ Terms of Reference para 8.

¹⁰⁸ Practice note No 1, above n 109, para 4.

¹⁰⁹ Comment by the Chairperson of the Refugee Status Appeals Authority, B O Nicholson, at a seminar on Refugee Law, 8 June 1992, Auckland Institute of Technology Refugee Education Programme.

¹¹⁰ Terms of Reference para 15.

¹¹¹ Annex to Cabinet Minute CAB (90) M 46/22.

¹¹² Advice to RSAA, letter dated 4 June 1991.

¹¹³ Comment by R P G Haines, Member, Refugee Status Appeals Authority, above n 25.

¹¹⁴ Above.

(d) The operation of the obligation of *non-refoulement* in New Zealand

The Appeals Authority is developing an indigenous refugee jurisprudence in a series of thorough and closely reasoned decisions in a difficult area of judicial decision-making¹¹⁵.

The concept of the manifestly unfounded claim has recently been commented on by the High Court in *Silke Ali v Minister of Immigration*¹¹⁶. This applicant arrived as a stowaway. NZIS refused to accept his application for refugee status, because a prior application for refugee status in the Netherlands had been refused¹¹⁷. The applicant applied for an interim order under the Judicature Amendment Act 1972 preventing his removal from New Zealand. The statutory power of decision in question was the power of the immigration officer to refuse to issue a visitor's permit to the applicant.

NZIS argued that the applicant should be denied access to the refugee determination procedure because he had already been denied refugee status by another Convention country. Barker J rejected this argument and granted an interim order forbidding the removal of the plaintiff from New Zealand pending the determination of his appeal by the RSAA. His Honour said:¹¹⁸

it seems to me that the Government having set up this elaborate appeal procedure, the plaintiff must have the right to have his appeal determined in accordance with it. ... I cannot see that the fact the New Zealand Immigration Service refuses even to consider whether this man should go through the new process is other than saying that his claim is manifestly unfounded. If that is the case, then he clearly has been given a right of appeal against that determination.

The RSAA¹¹⁹ declined the appeal, but in doing so severely constrained the use of the concept of "manifestly unfounded claims" as a means of avoiding the obligation to allow a refugee applicant access to the refugee determination procedure. The RSAA approved Goodwin-Gill's opinion that "the chances of erroneous denial of access to the procedure are too great to justify any form of filter"¹²⁰ and approved the "compelling logic" that:¹²¹

the concept of manifestly unfounded claims is logically so narrow as to be practically unworkable... Its maintenance as an enforcement tool renders it potentially open to administrative misapplication. Therefore, all claims to refugee status must be considered as substantive.

¹¹⁵ Its decisions are held in the RSS of the NZIS.

¹¹⁶ (Unreported, 13 December 1991, High Court, Auckland, Barker J, M 2270/91).

¹¹⁷ Above, 10, and because he was "a flag state responsibility".

¹¹⁸ Above, 6 and 8 - 9.

¹¹⁹ *Refugee Appeal No 1/92 Re SA*, above n 32.

¹²⁰ Above 16.

¹²¹ Above, 18 - 19. "What is manifest to some is often not to others. Refugee claims are generally of that kind. They address themselves to experiences and conditions in other countries well-removed from direct observation": Plaut *Refugee Determination in Canada* (1985), 96. A manifestly unfounded claim is not any unsuccessful claim: above n 32, 18.

The effect of these decisions is that all applicants for refugee status in New Zealand are now entitled to have their applications considered under the determination procedure. Since the categorisation of a claim as manifestly unfounded is a decision of a substantive character, a refusal to consider a claim at the point when an asylum-seeker first enters New Zealand may be the subject of an appeal to the RSAA. Substantive decisions on refugee status may be made in New Zealand only by officers of the RSS of the NZIS or by the RSAA. This requirement effectively prevents border officials from rejecting an application for refugee status on the grounds that it is manifestly unfounded.

The High Court decision in *Silke Ali* and the decision of the RSAA in *Refugee Appeal No 1/92* also established that the principle of responsibility of the country of first asylum (the "safe third country" principle) has no application in New Zealand. Access to the determination procedure may not be denied simply because the applicant has been denied refugee status in another Convention country with "an acceptable and civilised system of justice"¹²².

Barker J noted that the Terms of Reference for the RSAA did not preclude applications for the grant of refugee status by persons who had been denied refugee status by another country, and commented that "one might not be quite so sanguine about legal procedures in some countries which are parties to the convention as one might be about procedures in Holland"¹²³.

In *Refugee Appeal No 1/92*, the RSAA stated that:¹²⁴

[t]here is nothing in law or in principle to justify *the refusal to consider* an application for refugee status on the basis that another State Party to the Refugee Convention has already declined an application by that person for refugee status ... In our view, the fact that the Dutch authorities rejected the appellant as a refugee does not prevent us from entertaining the appeal and considering the case *de novo*. However, *what was said* by the appellant to the Dutch authorities may be highly relevant to the appellant's credibility.

(e) Summary

The obligation of *non-refoulement* operates in New Zealand to ensure that all asylum-seekers are entitled to have their claims for refugee status determined in accordance with the procedures established by the Government. Applicants for refugee status may not be returned to their country of origin or sent to a third state by border or other officials without having the substance of their claims determined. This right is not restricted to

¹²² Above n 119, 4.

¹²³ Above, 5.

¹²⁴ Above n 32, 28 and 31.

those who have lawfully entered New Zealand, but extends also to all asylum-seekers, including those without the documentation required under the Immigration Act. The concepts of "manifestly unfounded claims" and "safe third country" currently have no application in New Zealand.

B The Failure to Legislate

It is understandable that no statutory basis was provided for the ICOR determination procedure, since the conduct of foreign affairs is not usually regulated by statute. However, the decision not to legislate when the procedures were changed in 1990 was unusual, since apart from refugee matters, immigration matters have been comprehensively covered by statute since 1964. The opportunity to legislate to cover refugee matters was presented when the Immigration Act 1964 was repealed and replaced with the 1987 Act (shortly after the Benipal decision), and again in 1991, when a substantial amendment to the Immigration Act was passed¹²⁵.

There is general, indeed almost unanimous, agreement on the desirability of legislation in this area¹²⁶. However, at this stage legislation is unlikely to be enacted in the foreseeable future. In my opinion the failure to legislate emanates from the desire of the Government to have maximum flexibility in this area:¹²⁷

One consequence of the survival of the prerogative is that a particular power may not be subject to parliamentary or judicial safeguards that would be considered appropriate if the power was being conferred afresh by legislation ... [and i]t has evidently been more convenient for successive governments to retain prerogative powers in their ancient form than to modernise them.

However, for the reasons set out in Part III B6 below, the failure to legislate may have left the Government with less flexibility than legislation would have provided.

¹²⁵ No 113 of 1991.

¹²⁶ Submissions to the Labour Select Committee which considered the Immigration Amendment Bill in favour of the introduction of legislation on the status of refugees were made in July, August and September 1991 by *inter alia* the Legislation Advisory Committee; the New Zealand Law Society; Amnesty International; and the Human Rights Commission. The Wilson Report (above n 94, 18 - 19 and 21) also recommends legislation.

¹²⁷ E C S Wade and A W Bradley *Constitutional and Administrative Law* (10 ed, 1985) 248 (hereafter, Bradley).

C *The Immigration Act 1987: Provisions Affecting Refugees*

Although the procedures for determination of refugee status are not contained in legislation, several provisions in the Immigration Act 1987 affect the ability of refugees to come to New Zealand to seek refuge and affect the way they are received once they arrive. Virtually all developed nations have, in recent years, erected barriers to asylum-seekers¹²⁸. The effectiveness of these measures in reducing the numbers of spontaneous refugee applications in New Zealand has yet to be assessed.

I *Visas, permits and removal procedures*

The general provisions of the Immigration Act require that all travellers to New Zealand must obtain a visa before proceeding to New Zealand¹²⁹. Once travellers arrive in New Zealand, they must, if they are not New Zealand citizens or exempt persons¹³⁰ obtain a permit to be in New Zealand¹³¹. If they do not hold a permit, they are "deemed for the purposes of [the] Act to be in New Zealand unlawfully"¹³².

Persons in New Zealand unlawfully may be removed under the procedures set out in Part II of the Act. Those subject to removal may be taken into custody in certain circumstances¹³³. A person detained must be brought before a District Court Judge within 48 hours to determine whether that person should be detained in custody, pursuant to a warrant of commitment, or released¹³⁴. If a warrant of commitment is issued, the person detained remains in custody for 21 days, and is then brought before a judge for further consideration and at weekly intervals after that¹³⁵.

There is a right of appeal on the facts or on humanitarian grounds against the issue of a removal order to the Removal Review Authority¹³⁶, with a further appeal on a question

¹²⁸ M Fullerton "Restricting the Flow of Asylum-Seekers in Belgium, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights" (1988) 26 Va J Int'l L 35; Martin (ed) *The New Asylum Seekers: Refugee Law in the 1980s* (1988).

¹²⁹ Sections 14 - 14E of the Immigration Act. Certain classes of travellers specified in Part I of the First Schedule to the Immigration Regulations 1991 are exempt from the requirement to obtain a visa.

¹³⁰ Immigration Regulations 1991 First Schedule Part II.

¹³¹ Immigration Act 1987 s 4(1).

¹³² Above, s 4(2).

¹³³ For failure to supply an address for service (s 47(2)); if she is a prohibited person under s (7(1)); if there is a belief that the person may abscond within NZ (s 53(1)(d)); and for breaching reporting requirements (s 57(5)) or other conditions imposed by a District Court Judge (s 54(5)).

¹³⁴ Immigration Act 1987 s 55.

¹³⁵ Above s 56.

¹³⁶ Above s 63A and B.

of law to the High Court and Court of Appeal¹³⁷. A refugee applicant refused residence could also appeal to the Residence Appeal Authority under section 18C of the Immigration Act, with further appeals to the High Court and Court of Appeal¹³⁸. Judicial review of adverse decisions may also be pursued¹³⁹.

2 *Carrier sanctions*

Carrier sanctions are penalties imposed on the owner or charterer¹⁴⁰ of an aircraft or ship or other craft for failing to ensure that passengers comply with the immigration rules or laws of the country. Section 125 (1) of the Act provides that:

The person in charge of any craft that is en route to New Zealand from another country shall, for the purpose of ensuring or facilitating compliance with this Act, from the time when the craft enters the territorial limits of New Zealand be responsible for preventing, with such reasonable force as may be necessary, the disembarkation of any person from the craft other than -

to enable that person to present herself to an immigration officer and to produce that person's passport.

For asylum-seekers, arrival with appropriate documentation would be unusual. It was pointed out to the Labour Select Committee in 1991 that:¹⁴¹

[a]most invariably [refugees] will be obliged to use unlawful means both to leave their countries of origin and to cross other international borders to reach a final country of asylum. Indeed, the fact that an asylum seeker has been able to secure a lawful passport, proper exit visas and travel documentation, has been found to be a negative factor in his or her claim for refugee status.

Section 125(2) places the responsibility on carriers to ensure that all persons boarding a craft in another country have appropriate documentation for immigration purposes. Section 125 (4)(a) places responsibility on a carrier to carry the cost of passage from New Zealand of any person who was brought here by the carrier and who did not hold a visa and was not granted a permit on arrival in New Zealand. The carrier is also obliged to pay any costs incurred by the Crown "in detaining or maintaining that person pending the person's departure ..."¹⁴².

¹³⁷ Sections 115A and 116 respectively.

¹³⁸ Sections 115 and 116 respectively.

¹³⁹ There is also provision in s 35A of the Act for the Minister to grant permits in special cases as an exception to Government policy.

¹⁴⁰ As defined in s 2 of the Act.

¹⁴¹ Submissions on the Immigration Amendment Bill 1991 in Relation to the Rights of Asylum Seekers and Refugees in New Zealand, R J Towle, Haigh Lyon and Co, July 1991, 8.

¹⁴² Section 125(4)(b).

Penalties for failing to comply include imprisonment for up to 3 months, or the imposition of a fine of up to \$10,000¹⁴³ for the person in charge of the craft and up to \$20,000¹⁴⁴ for the carrier. These provisions, which place responsibility for carrying out immigration functions on to carriers, are extremely effective in encouraging airlines to prevent people boarding aircraft without appropriate documentation. While prosecution of airlines under these provisions is rare, the threat of prosecution has been effective in ensuring that carriers comply with the Act. A memorandum of understanding between NZIS and the main carriers to facilitate compliance with the Act is also currently being drawn up.

3 *Transit visas*

A common method of arrival for refugees coming to New Zealand has been to claim protection while in transit through New Zealand ports to other destinations. Prior to the 1991 amending legislation, visas were not required by transit passengers. Section 14E of the Act¹⁴⁵ now requires certain persons classified by regulation to obtain a transit visa before proceeding to New Zealand. Section 14E(5) provides that the holder of a transit visa is not entitled to apply for any sort of permit in New Zealand; those who do attempt to apply for permits may be detained under section 128 of the Act¹⁴⁶.

The Immigration Regulations 1991 specify¹⁴⁷ which persons are required to have transit visas. The persons classified are citizens of those countries from which in the past comparatively large numbers of refugees have arrived in New Zealand. The Schedule targets the likely route or mode of arrival of those people¹⁴⁸.

4 *Detention*

Sections 128, 128A and 128B of the Act provide for the detention of persons arriving in New Zealand in an irregular manner. These provisions were amended in 1991, following the decision of the Court of Appeal in *D v Minister of Immigration*¹⁴⁹. In that case, the appellants, refugee applicants who arrived from Pakistan during the Gulf

¹⁴³ Section 125(6)(a); increased from \$5000 by the Immigration Amendment Act 1991.

¹⁴⁴ Section 125(6)(b); increased from \$10000 by the Immigration Amendment Act 1991.

¹⁴⁵ As inserted by s 8 of the Immigration Amendment Act 1991.

¹⁴⁶ See "Detention" below.

¹⁴⁷ Amendment No 1 Schedule 1A.

¹⁴⁸ For example citizens of India, Iraq, Zaire or the People's Republic of China transiting through New Zealand to or from Fiji, Tonga, the Solomon Islands or Western Samoa.

¹⁴⁹ [1991] 2 NZLR 672.

War¹⁵⁰ were not granted a security clearance by the police. The NZIS proposed to remove them. An application for review of the decision to remove was unsuccessful. The Court of Appeal drew attention:¹⁵¹

to the lack in New Zealand of any legislative provision for the temporary detention of applicants for refugee status while their status is being investigated ... [T]he present statute law does have the result that, because of the security risk in New Zealand, Government officers may have at times to send away, and perhaps back to persecution, persons who *may* have genuine reasons to fear persecution for their political beliefs.

The legislation as amended now provides for such detention. Many of the people to whom the provisions of sections 128, 128A and 128B might apply are those wishing to acquire refugee status here. Section 128 applies to any person who arrives in New Zealand and does not apply for or is refused a permit and to stowaways. It provides for the detention and removal of such people other than in accordance with the normal removal procedures described above¹⁵².

Section 128 applies only during the first 72 hours after arrival in New Zealand. A section 128 person may be detained during that period by the police pending departure from New Zealand on the first available craft¹⁵³. A warrant of commitment providing for detention for 28 days must be issued by the Registrar of the District Court if the person concerned is to be held in custody for longer than 48 hours¹⁵⁴. Such a person is not entitled to bail¹⁵⁵ but if section 128A applies that person may be "released on conditions"¹⁵⁶. If a person to whom section 128 could apply is not detained within the first 72 hours after arrival, section 128 does not apply. If such a person cannot be removed within the 28 day period, she must be released from custody and normal removal procedures apply¹⁵⁷.

If a person detained under section 128 brings review proceedings (including proceedings for a writ of habeas corpus), she must remain in detention pending determination of the proceedings¹⁵⁸. The person cannot be brought before a District Court Judge until 28 days after the date on which the warrant of commitment is issued, and may then be

¹⁵⁰ Special provisional Refugee Status Determination Procedures were introduced during the Gulf War to deal with refugee applications. These procedures were criticised by UNHCR and non-governmental organisations in New Zealand as being in breach of the Convention.

¹⁵¹ Above n 152, 676.

¹⁵² In the year to 30 June 1992, 156 arrivals were "turned around" under s 128, usually because they did not have visas. Most of these 156 arrivals were from Thailand (20) and Iran (20).

¹⁵³ Immigration Act 1987 s 128(5).

¹⁵⁴ Above, s 128(7).

¹⁵⁵ Above, s 128(15).

¹⁵⁶ Above, s 128A(4).

¹⁵⁷ Above, s 128(13) and (14).

¹⁵⁸ Section 128A(2)(a).

released if she satisfies the Judge that she is not likely to abscond or breach any condition imposed on release¹⁵⁹.

Section 128B provides for the detention of persons who arrive in New Zealand and whose eligibility for a permit is not immediately ascertainable because they may be a prohibited immigrant under section 7(1) of the Act. Section 7(1) applies *inter alia* to certain persons convicted of criminal offences, previous deportees, those involved in terrorist or criminal activities including drug offences, and those who the Minister has reason to believe are likely to constitute a danger to the security or public order of New Zealand or are members of an organisation which has criminal objectives.

Section 128B persons may be detained in custody pursuant to a warrant of commitment issued by a District Court Judge until the Minister of Immigration makes a determination about whether section 7(1) applies to that person¹⁶⁰. Bail may not be granted to such persons¹⁶¹. The warrant of commitment must be extended by the District Court Judge if the Judge is satisfied the person is a person to whom section 128B applies¹⁶².

D Policy

The NZIS *Manual of Immigration Instructions* contains Government policy relating to the grant of visas and permits¹⁶³ and instructions for immigration officers on how to apply the Immigration Act. That part of the manual relating to arrivals and departures is, at the time of writing, being revised to take account of the changes to the Act made in 1991. The "old" provisions in Chapter 15 of the manual relating to section 128 do not mention the possibility that section 128 persons may be refugees. However, the manual when rewritten will contain a note to the effect that section 128 may be used only in compliance with New Zealand's international obligations to refugees.

The updated manual will also make reference to refugee applicants in the instructions on the implementation of section 128B. The chapter on refugees¹⁶⁴ has not, however, been updated since the new determination procedures were introduced in January 1991. The absence of a comprehensive approach in the manual to applications for refugee status means that compliance with the provisions of the Refugee Convention depends largely,

¹⁵⁹ Section 128A(2)(b), (3) and (4).

¹⁶⁰ Section 128B(3).

¹⁶¹ Section 128B(12).

¹⁶² Section 128B(11).

¹⁶³ Section 13A - 13C of the Immigration Act.

¹⁶⁴ Chapter 8.

in a practical sense, on the quality and extent of training given to those making decisions at the border and the depth of NZIS commitment to ensuring that the provisions of the Convention are adhered to.

E Do New Zealand's laws comply with the Refugee Convention?

It has been suggested that the provisions of sections 128 to 128B of the Immigration Act are in conflict with the Refugee Convention¹⁶⁵. A detailed study of that contention is outside the scope of this research paper. However, my opinion is that there is nothing inherent in these provisions which envisages or compels *refoulement* or other action contrary to the Convention. On the other hand, these provisions do not ensure that refugees are protected against *refoulement*. The important factor when considering compliance with the Convention is how these provisions are translated into action by those responsible for decision-making in this area.

The RSAA expressed concern about the manner in which the applicant in *Refugee Appeal No 1/92* had been detained and noted that:¹⁶⁶

it is also appropriate, when considering the question of detention, to bear in mind that detention to deter others may well violate the fundamental Convention obligation of *non-refoulement* to the extent that incarceration encourages refugees to abandon their asylum applications and return to territories where they may face persecution.

It has also been suggested that laws imposing carrier sanctions on airlines who bring refugees to receiving countries¹⁶⁷, preventing legal entry of refugee applicants¹⁶⁸, and imposing visa requirements on those coming from refugee-producing states¹⁶⁹ conflict certainly with the spirit¹⁷⁰ and perhaps with the letter¹⁷¹ of international refugee law. If this is the case, then the laws of most of the developed countries of the world, which are also parties to the Convention, are in breach of the Convention. Enforcement of international obligations in these circumstances becomes an academic issue. The

¹⁶⁵ Submissions to the Labour Select Committee by R J Towle 24; the Legislation Advisory Committee para 46; the Human Rights Commission 9. See also *Lawtalk*, Newsletter of the New Zealand Law Society, 25 November 1991, No 362, 5.

¹⁶⁶ Above n 32, 34.

¹⁶⁷ Fullerton, above n 41, 113 - 114.

¹⁶⁸ J Crawford and P Hyndman "Three Heresies in the Application of the Refugee Convention" (1989) 1 *IJRL* 155, 176 - 177.

¹⁶⁹ G Stenberg *Non Expulsion and Non-Refoulement* (1989) 292.

¹⁷⁰ Martin *Asylum Seekers* 13.

¹⁷¹ Above, 67 - 69; see also Fullerton, above n 41, 37.

development or retention of an effective international protection system for refugees¹⁷² is a question of almost overwhelming difficulty; and it is not a legal question.

¹⁷² See Hathaway "A Reconsideration of the Underlying Premise of Refugee Law" (1990) *Harv Int'l LJ* 129 and "Reconceiving Refugee Law as Human Rights Protection" (1991) *Vol 4 No 2 Journal of Refugee Studies* 113. See also B S Chimni "Perspectives on Voluntary Repatriation: A Critical Note" (1991) 3 *IJRL* 541.

III THE REFUGEE CONVENTION AS PART OF NEW ZEALAND'S DOMESTIC LAW

A *Description of Thesis*

The main thesis of this paper is that the 1951 Convention Relating to the Status of Refugees (including the requirement to establish a procedure for the determination of refugee status and the duty not to return refugees to places where they may be persecuted) is now part of the law of New Zealand. The Convention has been incorporated into New Zealand law in the following ways¹⁷³.

First, the Convention has been imported into domestic law through the adoption by the Government of procedures incorporating Convention principles and standards through the exercise of Crown prerogative. In setting up these procedures domestically, the Crown has acted to ensure compliance with its international obligations under the Convention¹⁷⁴. In acting in accordance with the procedures established by the Crown, the Crown is "applying the Convention procedure"¹⁷⁵.

Secondly, *non-refoulement* is a customary rule of international law and, since there is nothing in the Immigration Act which is inconsistent with this customary rule, the duty of *non-refoulement* is therefore part of the common law of New Zealand.

Thirdly, the Convention is a relevant consideration which the Minister or the appropriate decision-maker, exercising discretionary powers either under statute¹⁷⁶ or under the procedures established under the prerogative¹⁷⁷, is obliged to take into account when making decisions on immigration matters where refugee status may be an issue.

¹⁷³ The extent to which the New Zealand Bill of Rights Act 1990 and in particular s 18(4) (Freedom of Movement) may affect the rights of asylum seekers is not addressed in this paper.

¹⁷⁴ *Benipal v Ministers of Foreign Affairs and Immigration* above n 21, 47 and 237.

¹⁷⁵ Above, 51.

¹⁷⁶ For example, the decision whether to issue a permit under the Immigration Act.

¹⁷⁷ For example, the decision whether to grant refugee status to an applicant.

B *Importation of the Refugee Convention into Domestic Law Through the Exercise of Crown Prerogative*

I *Introduction*

The powers of the Crown must either be derived from Act of Parliament or be recognised as a matter of common law¹⁷⁸. In 1992 the vast majority of the Crown's activity is authorised through Act of Parliament¹⁷⁹, yet a significant number of the Crown's activities are carried on under the authority of the prerogative, for example the executive powers of the Crown to govern and powers relating to foreign affairs¹⁸⁰ including the power to enter into treaties¹⁸¹.

Several writers state without reservation that treaties may be implemented, as opposed to entered into, only under the authority of statute. Wade says that "there is no prerogative power to enforce treaties"¹⁸². The New Zealand Commentary states that "a treaty is not part of domestic law unless it has been adopted by statute and cannot affect clear provisions in a statute"¹⁸³.

If there is an absolute prohibition on the domestic implementation of international treaties other than by legislation, the proposition that the provisions of the Refugee Convention have been incorporated into the common law of New Zealand through the exercise of prerogative powers is incorrect. This section of the paper examines whether in principle treaties are able to be incorporated into domestic law through the exercise of

¹⁷⁸ "The prerogative is ... created and limited by the common law, and the Sovereign can claim no prerogatives except such as the law allows, nor such as are contrary to Magna Carta or any other statute, or to the liberties of the subject": *Halsbury's Laws of England* (4 ed) vol 8 Constitutional Law para 890 p 583 (hereafter, Halsbury). A summary of the constitutional principles relating to the exercise, nature and reviewability of Crown prerogative is contained in Appendix 4 to this research paper.

¹⁷⁹ E C S Wade and AW Bradley *Constitutional and Administrative Law* (10 ed, 1985) 247 (hereafter Bradley).

¹⁸⁰ Bradley, 248 - 252, lists the main areas in which the prerogative is exercised today.

¹⁸¹ *Blackburn v Attorney-General* [1971] 2 All ER 1380 (CA); Bradley, 249.

¹⁸² H W R Wade *Administrative Law* (6 ed, 1988) 241; although at 830, citing *Walker v Baird* [1892] AC 491, Wade states the principle in slightly narrower terms: "The enforcement of treaties, so far as it affects the rights of persons within the jurisdiction, must be authorised by Act of Parliament". De Smith considers that "neither a declaration nor any other judicial remedy is obtainable for the purpose of ... securing performance of an international obligation undertaken by the Crown unless the obligation has been incorporated into municipal law by statute": J M Evans *de Smith's Judicial Review of Administrative Action* (4 ed, 1980) 499. Emphasis added.

¹⁸³ NZ Commentary on Halsbury's Laws of England (4 ed) Vol F Chapter 149 (Statutes) para 870, p 28. *Ashby v Minister of Immigration* [1981] 1 NZLR 222 per Cooke J at 224 is cited as authority for this proposition. See also *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 (HL); *Simsek v Minister of Immigration and Ethnic Affairs* (1982) 40 ALR 61.

"prerogative legislation", and, if they are, whether in any case judicial authority requires that the adoption of treaties domestically should not take place in this way.

My conclusion, after a consideration of the authorities discussed below, is that the statements of Wade and the New Commentary are unnecessarily restrictive; in a narrow range of cases, the importation of treaties by prerogative is legally and constitutionally acceptable and there is no direct binding or highly persuasive judicial authority to the contrary.

2 *Does constitutional principle prevent the importation of treaties into domestic law through the exercise of the prerogative?*

In *Benipal v Ministers of Foreign Affairs and Immigration*¹⁸⁴, Chilwell J found that "the executive may, at domestic level, implement treaty obligations in a non statutory way"¹⁸⁵. Several authorities in support of the position that treaty obligations have no legal effect upon the rights and duties of the subjects of the Crown were cited to Chilwell J¹⁸⁶. However, His Honour decided that:¹⁸⁷

[i]n the light of the *CCSU* decision, it seems to me that little is to be gained by considering the authorities last cited because the House of Lords has decided that executive action is not necessarily immune from judicial review merely because it was carried out in pursuance of a power derived from a prerogative source.

With respect, those authorities were cited as being relevant to the issue of the effect of treaty obligations on domestic law, not the issue of reviewability. In *CCSU* there was no discussion of the implementation of international conventions through the exercise of prerogative powers¹⁸⁸. It appears that Chilwell J mixed two separate issues: the first, whether the direct exercise of prerogative powers is reviewable; and the second whether treaty obligations can be imported into domestic law through the exercise of prerogative powers. Nevertheless, it is submitted that his statement that treaty obligations may be imported into domestic law in a non-statutory way is correct as a matter of principle.

¹⁸⁴ Since the judgment in *Benipal* has never been reported, and because it will continue to influence legal and policy consideration of refugee law in New Zealand for some time to come, a summary of the facts and of the main findings is contained in Appendix 3 to this research paper.

¹⁸⁵ Above n 21, 264.

¹⁸⁶ Above n 21, 263: *Rustomjee v The Queen* (1876) 1 QB 487; *Civilian War Claimants Association Ltd v The King* [1932] AC 14; *Tukino v Aotea District Maori Land Board* [1941] AC 308; *Republic of Italy v Hambros Bank Ltd* [1950] 1 Ch 314; *Buck v Attorney-General* [1965] 1 Ch 745; *Laker Airways Ltd v Department of Trade* [1977] 2 All ER 182; *Malone v Metropolitan Police Commissioner* [1979] 2 WLR 700; *Ashby*, above n 186; *Simsek v Minister of Immigration and Ethnic Affairs* (1982) 40 ALR 61.

¹⁸⁷ Above n 21, 264.

¹⁸⁸ Except for an aside by Lord Fraser, 946.

The relevant principles of constitutional and international law are set out below.

(a) Crown prerogative may be exercised only in an area in which the common law recognises the existence of Crown prerogative¹⁸⁹. The categories of the prerogative are, in general, closed and may not be extended¹⁹⁰.

The power to control the entry of aliens is a prerogative power¹⁹¹. In New Zealand, this power has been all but superseded by statute. The Immigration Act 1987 contains a comprehensive set of rules relating to the conditions under which travellers are able to enter New Zealand¹⁹² and does not reserve prerogative powers to the Crown¹⁹³. Nevertheless, it is submitted that to the extent that the Immigration Act does not deal with a particular immigration matter (and to that extent only), the Crown has authority to act in that matter by virtue of its prerogative powers.

This question was considered in *Chandra v Minister of Immigration*¹⁹⁴. In the course of argument about the nature of the Minister's discretionary power to grant or refuse a residence permit, counsel for the Minister submitted that the royal prerogative to exclude aliens must apply except to the extent that it was specifically affected by statute¹⁹⁵. Commenting on this submission, Barker J referred¹⁹⁶ to *Lucas v Coleman*¹⁹⁷. In that case, O'Regan J had said that subject to the provisions of the Act, the common law applied in the area of immigration.

Barker J identified a "legislative trend" away from the common law classification of immigrants to a completely statutory regulated process¹⁹⁸ and commented that:¹⁹⁹

from a commonsense point of view there is much to be said for ...[the] submission that the old concept of the Royal prerogative to keep foreigners at bay has been superseded by the modern transportation and the mass population movements of the 20th century.

Nevertheless, he found that it was "undoubtedly true" that the common law applied unless modified by statute²⁰⁰. It is submitted that on the authority of *Chandra* and *Lucas*

¹⁸⁹ Bradley, 254.

¹⁹⁰ *BBC v Johns* [1965] Ch 32, per Diplock LJ, 79.

¹⁹¹ *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, per Lord Denning at 168; Bradley, 250.

¹⁹² See above, Part IIC.

¹⁹³ Compare the External Relations Act 1988 s 13.

¹⁹⁴ [1978] 2 NZLR 559.

¹⁹⁵ It appears (568) that this argument was put forward to draw a distinction between the rules applying to aliens and the rules applying to Commonwealth citizens.

¹⁹⁶ Above, 567.

¹⁹⁷ Unreported, 27 March 1975, Wellington Registry, M 134/75.

¹⁹⁸ Above.

¹⁹⁹ Above n 197, 568.

v *Coleman*, prerogative power may still be exercised in the admittedly small area of immigration matters not covered by the Immigration Act as long as the exercise of prerogative power is not inconsistent with the provisions of that Act.

(b) The doctrine of the legislative supremacy of Parliament means that the extent and the use of the prerogative may be curtailed at any stage and in any manner by legislation²⁰¹. The doctrine also requires that in the event of conflict between a purported use of the prerogative and the provisions of a statute, the provisions of the statute will prevail²⁰². Further, if a statute gives power to the Crown in an area in which the Crown may also act pursuant to the prerogative, the Crown must act under the authority of the statute and not by virtue of the prerogative²⁰³.

However, if the area is not one in which Parliament has decided to legislate (and if existing common law is not disturbed²⁰⁴) then there is no impediment to the exercise of prerogative powers.

(c) While the vast majority of legislative acts are Acts of Parliament, the Crown retains a residual power of "prerogative legislation", albeit in a small and strictly defined area:²⁰⁵

While one result of the 17th-century constitutional conflict was to impose very severe limits on the authority of the Crown to make new law without the approval of Parliament, certain legislative powers of the Crown have survived.

The Crown may "legislate" without the authority of Parliament within the areas recognised as areas in which the Crown may act under the prerogative. The Order in Council in *CCSU* was "prerogative legislation". The setting up of tribunals under the prerogative²⁰⁶ is akin to legislation, although the form of the document setting up such bodies may not be traditionally legislative. The setting up of refugee determination

²⁰⁰ Above, although Barker J stated that for the purposes of reviewability of immigration decisions "the point must now be reached where the common law has been so overlaid by statutory provisions that any analogy with the common law could be misleading".

²⁰¹ Bradley, 252 - 253.

²⁰² See the principles summarised in Appendix 4.

²⁰³ *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508; *Laker Airways Ltd v Department of Trade* above n . A statute does not necessarily remove prerogative powers, even if they are not expressly preserved: *R v Secretary of State for the Home Department, ex p Northumbria Police Authority* [1989] QB 26; [1988] 1 All ER 556 cited to All ER.

²⁰⁴ Halsbury, vol 8, para 920 p 595 - 596. "Prerogative legislation" for the purposes of this paper is defined as the limited authority of the Crown to make new law by formal decision or declaration.

²⁰⁵ Bradley, 43. Halsbury, vol 8, para 908 p 592 advises that Magna Carta (1297), the Petition of Right (1627), the Bill of Rights (1688) and the Act of Settlement (1700) "must not be regarded as curtailments of existing prerogatives, but as declarations of the fundamental laws of England": 2 Co Inst proem 3.

²⁰⁶ *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864; [1967] 2 All ER 770.

procedures is also "legislation by prerogative"²⁰⁷. There is no set form which "prerogative legislation" must take²⁰⁸.

(d) The doctrine of the legislative supremacy of Parliament also controls the extent to which international law may be imported into domestic law. "International law is part of the law of the land, but it yields to statute"²⁰⁹. General principles of international law²¹⁰ are incorporated directly into municipal law, as long as they are not inconsistent with Acts of Parliament²¹¹ or prior judicial decisions of final authority²¹². This is the traditional rule of common law²¹³.

(e) The rules relating to treaties are an exception to this common law rule. There is a rule that treaties do not have direct effect in domestic law and are subject to a doctrine of transformation²¹⁴. However, the rule is not absolute and applies only to certain classes of treaties. Brownlie, for example, concludes that:²¹⁵

treaties are only part of English law if an enabling Act of Parliament has been passed. This rule applies to treaties which affect private rights or liabilities, result in a charge on public funds, or require modification of the common law or statute for their enforcement in the courts. The rule does not apply to treaties relating to the conduct of war or treaties of cession.

Halsbury states the proposition more broadly than the New Zealand Commentary:²¹⁶

[A]ny treaty which requires a change in English law in order to make that law conform with the provisions of the treaty, and thus ensure that those provisions are cognisable and enforceable in the English courts, requires that the necessary legislation be enacted.

²⁰⁷ Compare J B Elkind and A Shaw "Municipal Enforcement of the Prohibition against Racial Discrimination" [1984] BYIL 190, 240 who argue that treaty obligations may be imported merely by "policy decisions".

²⁰⁸ Bradley, 60 and 70; Halsbury, vol 8, para 1087 pp 670 - 678.

²⁰⁹ *Cheney v Conn* [1968] 1 All ER 779, 781 (per Ungood-Thomas J). See also *Mortensen v Peters* (1906) 8 F (J) 93.

²¹⁰ Customary rules of international law.

²¹¹ *Cheney v Conn* above n 209.

²¹² *Chung Chi Cheung v The King* [1939] AC 160; *Polites v The Commonwealth* (1945) 70 CLR 60. See also I Brownlie *Principles of Public International Law* (4 ed, 1990) above n , 43. For a more recent authority, see *R v Chief Metropolitan Stipendiary Magistrate, ex p Choudhury* [1991] 1 All ER 306, 320 - 322 per Watkins LJ.

²¹³ *Cheney v Conn*, above n 209, 781, citing *Oppenheim's International Law* (8 ed), 40.

²¹⁴ Bradley, 47 - 48.

²¹⁵ Brownlie *Public International Law*, 48. Bradley states (304): "[A]lthough the executive has a largely unfettered power to enter into treaty obligations, normally such obligations need to be implemented by domestic legislation before they will be enforced as law by courts in the United Kingdom... The general rule ... may be subject to exceptions". Emphasis added.

²¹⁶ Volume 18 Foreign Relations Law para 1405 p 719. See also the finding of Lord Diplock in *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116; [1966] 3 All ER 871, 875: "Where by a treaty Her Majesty's Government undertakes ... to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations". Emphasis added.

The reason why the transformation doctrine must be applied in relation to treaties is not because, in principle, international law may not be incorporated directly into domestic law. If "a body of rules which nations accept among themselves"²¹⁷ (customary international law) is incorporated directly into domestic law, then there is no reason in the constitutional principles governing the relationship between domestic and international law why the same or similar rules agreed on positively in an international Convention may not also be directly incorporated.

The reason for the rule is based rather on the domestic relationship between the authority of Parliament and Crown prerogative:²¹⁸

In England, and also it seems in most Commonwealth countries, the conclusion and ratification of treaties are within the prerogative of the Crown (or its equivalent), and if a transformation doctrine were not applied, the Crown could legislate for the subject without Parliamentary consent.

In many cases, international treaties, and particularly commercial treaties, will affect the private rights of citizens. In these cases, the doctrine of the supremacy of Parliament will not allow the law to be altered through the operation of prerogative powers²¹⁹. However, the purpose of the rule that the Crown may not, through the exercise of the prerogative, alter the statutory or common law rights of citizens is a rule which exists to prevent the Crown purporting to override the authority of Parliament and the courts. The rule was not developed to prevent rules of international law being imported into domestic law.

Elkind and Shaw²²⁰ argue that international treaties may be (directly) incorporated into domestic law through the operation of the rule of customary rule of international law *pacta sunt servanda*. While this proposition is logically correct, it fails to give sufficient weight to constitutional concerns about abuse of power by the Crown; not by the sovereign, but by her Cabinet advisers²²¹. Because of the extent of the power of the Cabinet under present constitutional arrangements, it is submitted that in practical terms something more than an analogy with or use of the rules relating to customary international law is required before international treaties can be incorporated into domestic law without Parliamentary legislation. The transformation doctrine should still

²¹⁷ *Chung Chi Cheung v The King*, above n 215, 167 - 168 per Viscount Simonds.

²¹⁸ Brownlie *Public International Law* 47 - 48. See also Halsbury, above n 181, n 2; C Greenwood "The International Tin Council Litigation" All ER Rev 1989, 240, 245.

²¹⁹ *Case of Proclamations* (1611) 12 Co Rep 74, 76. See Bradley, 61.

²²⁰ Above n 210, 240.

²²¹ See *Fitzgerald v Muldoon*[1976] 2 NZLR 615; Bradley, 53 - 55.

be applied because it is a constitutional check on possible abuse of power²²². The Crown should not be able to "legislate" at will without Parliament and needs effective reminders that the power to "legislate" may be used only in a very closely-defined area.

If the Crown is to use its constitutional ability to "legislate" without Parliament, then it should be subject to some means of public accountability in respect of the use of that power. These additional constraints, which in the case of the Refugee Convention are satisfied, should be:

- (a) a conscious decision on the part of the executive (additional and subsequent to the ratification or signing of a treaty) that it intends to act to comply with the provisions of the Convention and to adopt them as domestic law;
- (b) a formal decision by Cabinet;
- (c) publication of this decision in some formal way²²³.

3 *The importation of treaties into domestic law through "prerogative legislation"*

These principles set out above describe our constitutional hierarchy of law making and determination. Parliamentary legislation prevails over common law, Crown prerogative and international law in the event of inconsistency or where statutory rules have been clearly adopted by Parliament in the area concerned. Common law²²⁴ prevails over the exercise of Crown prerogative (if the exercise of Crown prerogative infringes on the rights and liberties of citizens protected by common law) and over inconsistent rules of international law. At the bottom of this hierarchy of law-creating powers are Crown prerogative and international law (both customary and treaty law).

In the residual area left over from the operation of statute and common law, law may be made by "prerogative legislation" (defined above as the limited authority of the Crown to make new law by formal decision or declaration). The Crown's authority to "legislate" in this way empowers it to import into domestic law the provisions of a treaty if the provisions of that treaty:

- (a) operate in an area in which the Crown may act under the prerogative²²⁵;
- (b) deal with subjects which are not dealt with by Parliamentary legislation²²⁶; and

²²² Because customary rules tend to be developed (although not in all cases) gradually and are slow to be recognised, they do not have the same potential as treaties to affect domestic legal rights. The possibility of conflict between domestic law and customary international law is not as great.

²²³ Halsbury, above n 211, states that there is no set form for "prerogative legislation" (defined above, n 204).

²²⁴ For the purposes of this part of the paper, common law means non-statutory law declared by the courts excluding Crown prerogative. Crown prerogative may in other contexts be referred to as part of common law: see Appendix 4.

²²⁵ See Part III B2(a); *BBC v Johns*, above n 193.

(c) do not alter or purport to alter the rights of citizens as established by statute or finally-determined common law²²⁷.

This submission does not challenge fundamental constitutional principles about the separation of powers, the relationship between the prerogative and statute, nor the limited nature of the prerogative. "Legislation by prerogative" does not challenge the authority of Parliament if Parliament has not decided to legislate in a particular area where prerogative powers exist. If there is no change to finally determined common law, then judicial authority is not challenged. If the matter is "prerogative subject-matter", then the prerogative is not being extended.

Nor does it offend the rule that rights conferred by an international treaty are not imported directly into municipal law. The transformation doctrine still applies. A deliberate act of adoption must still be done²²⁸, albeit a "prerogative act" rather than an Act of Parliament.

The contention that treaty rights may be imported into municipal law through the exercise of the prerogative is an issue about *how* the provisions of an international treaty may be transformed into municipal law, not *whether* those provisions have a direct effect on municipal law. The prerogative can be the conduit through which a treaty becomes part of municipal law; it is the source of authority for the law, but it is not the law itself²²⁹. It will be submitted below that the law itself, as far as the treatment of refugee applicants in New Zealand is concerned, is now the Refugee Convention as applied by the RSS and the RSAA.

As a matter of principle, then, Chilwell J's decision that treaty obligations may be incorporated into New Zealand law other than by statute is correct. There is nothing in principle which compels the courts to adopt the position that treaty obligations may be imported into New Zealand law only by statute.

²²⁶ *Attorney-General v De Keyser's Royal Hotel*, above n 206.

²²⁷ *Case of Proclamations*, above n 222.

²²⁸ For example, the adoption and publication of a Cabinet decision.

²²⁹ "[O]ne must distinguish between the existence of the prerogative and the machinery set up to enable the expeditious and efficient use of that prerogative": *R v Secretary of State for the Home Department, ex p Northumbria Police Authority*, above n 206, per Purchas LJ, 570.

4 *Does judicial authority prevent incorporation by prerogative?*

In *Ashby v Minister of Immigration*²³⁰ the Minister of Immigration's decision to issue temporary entry permits under section 14 of the Immigration Act 1964 to members of the Springbok rugby team who were due to tour New Zealand was challenged. Ashby claimed that the Minister's discretion to issue permits could be exercised only in conformity with the International Convention on the Elimination of All Forms of Racial Discrimination of 1965²³¹.

The Court of Appeal held that the Minister's discretion to grant or refuse a temporary permit was not expressly fettered in any way, and that the Convention could not override the Act; Cooke J also noted that:²³²

[i]f the Convention does have some wider scope, which is not clear, it has not as to any such wider scope been incorporated into New Zealand law by any Act of Parliament. It is elementary that international treaty obligations are not binding in domestic law until they have become incorporated *in that way*.

The Court of Appeal found that the Racial Discrimination Convention had not been incorporated into domestic law by Parliament. It did not find that international treaties could not be incorporated into New Zealand law through the operation of the prerogative. The Court did find that international treaties could not be imported into domestic law *judicially*, and it refused to do this²³³. The broad statement in the judgment of Cooke J that treaty obligations may be incorporated only by Act of Parliament should be seen in this light rather than as a prohibition on the importation of treaty obligations through the prerogative, a point not touched on in *Ashby*.

It should also be noted that the statements on this point in the judgments of Richardson or Somers JJ are expressed in narrower and, it is submitted, more accurate terms. Richardson J said:²³⁴

It is not suggested that the Convention, as such, is part of the law of New Zealand for it is well settled that the making of a treaty is an executive act while the performance of its obligations, *if they entail alteration of the existing domestic law*, requires legislative action.

²³⁰ Above n 186.

²³¹ The argument put forward that the Convention was a relevant consideration which the Minister was bound to take into account in exercising his discretion is discussed in Part III E below.

²³² Above, per Cooke J, 224, emphasis added.

²³³ Above, per Cooke J, 226, ll 30 - 35 and per Somers J, 232, l 25.

²³⁴ Above, 229, citing *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 as authority for this proposition and also referring to Brownlie *Principles of Public International Law* (3 ed, 1979) 49. Emphasis added.

Somers J, while expressing substantial agreement with the reasons and conclusions of Cooke J, considered that "there may be room for debate as to how far international law is a part of New Zealand law..."²³⁵. It is unfortunate that the statement of principle of Cooke J rather than Richardson J has been subsequently adopted as a correct statement of the law in this area.

Cooke J's statement was quoted with approval by the Federal Court in Australia in *Kioa v Minister of Immigration and Ethnic Affairs*²³⁶. The appellants, Tongan citizens with an Australian-citizen daughter, sought review of a decision to deport them from Australia. They argued²³⁷ that the decision-maker was obliged to take into account certain provisions of the International Covenant on Civil and Political Rights and the Declaration of the Rights of the Child. In the Federal Court, Northrop and Wilcox JJ, citing the above-quoted extract from the judgment of Cooke J in *Ashby*, said that "[t]o make good their argument the appellants need to find a legislative adoption of the treaty provisions"²³⁸ and concluded that the Human Rights Commission Act 1981 (Cth) did not provide such an adoption.

In the High Court, only Gibbs CJ dealt with this point in any detail stating that it was "trite to say that treaties do not have the force of law unless they are given that effect by statute"²³⁹, citing *Simsek* with approval. However, the High Court found that the provisions of the Covenant and the Declaration had been complied with in any case by the immigration officer who made the decision to deport. *Kioa* does not take the question whether treaty obligations can be imported into domestic law through the exercise of the prerogative any further than *Ashby*, since this point was never raised nor commented on by the High Court.

In *Simsek v Minister of Immigration and Ethnic Affairs*²⁴⁰, Stephen J found that treaty obligations do not directly confer rights domestically, but he also went on to say:²⁴¹

In my view [the] authorities are not confined to the case of treaties which seek to impose obligations upon individuals; they rest upon a broader proposition. The reason of the matter is to be found in the fact that in our constitutional system treaties are matters for the Executive, involving the exercise of prerogative power, whereas it is for Parliament, and not for the Executive, to make or alter municipal law... .

²³⁵ Above, 232.

²³⁶ *Kioa v Minister of Immigration and Ethnic Affairs* (1984) 55 ALR 669, 680.

²³⁷ The main point for determination, whether the power to deport had to be exercised in accordance with the rules of natural justice, was decided in favour of the appellants. The treaty argument was a secondary argument.

²³⁸ Above n 236.

²³⁹ *Kioa v Minister of Immigration and Ethnic Affairs* (1985) 62 ALR 321, 336.

²⁴⁰ Above n 186.

²⁴¹ Above, 232.

This would seem to impose a blanket prohibition on the importation of treaties into domestic law through the exercise of the prerogative. However, it is submitted that *Simsek* is not persuasive on this point in New Zealand firstly because Stephen J does not deal with the point that the Crown clearly does retain a residual authority to legislate²⁴². Secondly, the principle expressed by Stephen J is much narrower than that found in other cases on the point, as the next section of the paper shows. Thirdly, *Simsek* conflicts directly with the later finding of Chilwell J (which, it is submitted, is correct in principle) that treaty obligations may be implemented in a non-statutory way.

The statements in *Ashby* and *Kioa* that it is "elementary"²⁴³ and "trite"²⁴⁴ that treaties may be incorporated into domestic law only by legislation express an unduly restrictive version of the rule relating to importation of treaty obligations into domestic law which is not supported by an examination of the early authorities on this question. The specific rules established by a series of English and Commonwealth decisions are set out below.

(a) A treaty can not directly deprive a citizen of statutory or common law private rights or remedies

The earliest case usually cited for the proposition that treaties may be imported into domestic law only by Parliamentary legislation is *The Parlement Belge*²⁴⁵. The Attorney-General argued that although the treaty in that case had not been confirmed by statute, "it was competent for her Majesty ... to put its provisions into operation without the confirmation of them by Parliament"²⁴⁶. Sir Robert Phillimore rejected this argument, saying that:²⁴⁷

[i]f the Crown had power without the authority of parliament by this treaty to order that the Parlement Belge should be entitled to all the privileges of a ship of war [then t]his is a use of the treaty-making prerogative of the Crown which I believe to be without precedent, and in principle

²⁴² Bradley and Halsbury, above n 208; This point is also recognised by P Cane "Prerogative Acts, Acts of State and Justiciability" (1980) 29 ICLQ 680, 690: "[T]he ban on unparliamentary legislation is not universal".

²⁴³ Above n 186, 224, per Cooke J.

²⁴⁴ Above n 242, 336, per Gibbs J.

²⁴⁵ (1879) 4 PD 129. The *Parlement Belge*, a Belgian packet owned by the Belgian King and carrying mail in British territorial waters, collided with a British ship, the *Daring*. The owners of the *Daring* filed proceedings in rem to recover redress. In the court of first instance, Sir Robert Phillimore found that the customary rule of international law which gave immunity from seizure to certain categories of public vessels such as ships of war did not extend to cover the *Parlement Belge*. However, under article 6 of a Convention entered into on 17 February 1876 between the Governments of Great Britain and Belgium, Belgian packets were "not [to] be diverted from their especial duty [of carrying mail] ... by any authority whatever, or be liable to seizure, detention, embargo or *arret de prince*".

²⁴⁶ Above.

²⁴⁷ Above, 154 - 155.

contrary to the laws of the constitution. ... [T]he remedy, in my opinion, is not to be found in depriving the British subject without his consent, direct or implied, of his right of action against a wrong-doer, but by the agency of diplomacy ...

Sir Robert Phillimore's decision was not that the Crown may not incorporate treaty obligations in a non-statutory way; it was that the Crown could not by treaty deprive a British subject of a right to claim damages in respect of harm done by a foreign person, even if that person were the sovereign of another state. He commented:²⁴⁸

Blackstone must have known very well that there were a class of treaties the provisions of which were inoperative without the confirmation of the legislature; while there were others which operated without such confirmation. The strongest instance of the latter, perhaps, ... is the Declaration of Paris in 1856, by which the Crown in the exercise of its prerogative deprived this country of belligerent rights, which very high authorities in the state and in the law had considered to be of vital importance to it. But this declaration did not affect the private rights of the subject; and the question before me is whether this treaty does affect private rights, and therefore required the sanction of the legislature.

His judgment therefore supports, rather than detracts from, the contention that the Crown may, in some circumstances, implement treaty obligations other than by Act of Parliament²⁴⁹. As Elkind and Shaw point out:²⁵⁰

[i]t is regrettable that Phillimore treated the case as one of first impression since he thereby failed to expose fully the constitutional roots of the doctrine on which he relied. Apart from undoubtedly learned speculation about what Blackstone must have known, the case offers little authority for its ratio decidendi.

A more recent decision on the same point, but where the exercise of the prerogative and the treaty also conflicted with statute law is *Laker Airways Ltd v Department of Trade*²⁵¹, in which the Court of Appeal granted a declaration that the Secretary of State could not exercise prerogative powers to cancel the licence granted to Mr Laker under statute to fly air services between London and New York.

²⁴⁸ Above.

²⁴⁹ Sir Robert Phillimore's judgment was overturned by the Court of Appeal ((1880) 5 P D 197) which found that it was a customary rule of international law, and therefore a part of the common law of England, that vessels such as the *Parlement Belge* were immune from seizure. The effect of the Convention was therefore not an issue. The Court of Appeal declined to answer the question "[w]hether, if the Court would otherwise have jurisdiction [to order that the ship could be seized], it was ousted by Article 6 of the Convention" and would neither "affirm nor deny" the finding of Sir Robert Phillimore on this point (204).

²⁵⁰ Above n 210, 237.

²⁵¹ Above n 189. See also *Walker v Baird* above n 185, in which the British and French Governments agreed that no new lobster factories were to be established in Newfoundland without joint British and French consent. When Baird established a lobster fishery it was seized by the local British naval commander. Baird sued for damages. The Crown conceded that it "could not maintain the proposition that [it] could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of a treaty"; nor did the Privy Council accept the Crown's argument that Walker's actions were justified as an "act of state" and that the court's jurisdiction was thereby ousted.

(b) Treaties do not directly confer private rights or liabilities

The House of Lords recently restated the rule that international treaties cannot directly confer private rights or liabilities in the *International Tin Council Appeals*²⁵². The International Tin Council (ITC) was established by treaty (the Sixth International Tin Agreement) in 1956 to adjust world tin production and consumption and to prevent excessive price fluctuation. It went broke, owing several hundred million pounds to its creditors, who then commenced several actions seeking to make the states who were members of the Council liable for the amounts owing by the ITC, either directly or indirectly.

Lord Templeman rejected the appellant creditors' submissions that the ITC had a right of indemnity against the member states by virtue of the treaty:²⁵³

Those submissions, if accepted, would involve a breach of the British constitution and an invasion by the judiciary of the functions of the Government and of Parliament. The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty.

A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.

Despite Lord Templeman's unequivocal summary of the law, he never specifically addressed the question whether treaty rights could be incorporated through the exercise of prerogative powers other than through statute. Lord Templeman said, obviously correctly, that treaty provisions do not *directly* give rights to or take rights away from citizens or alter the common law or statutes of Commonwealth countries. However, he did not say that treaty rights may not be incorporated into municipal law through the exercise of Crown prerogative and there is no indication that this matter was argued.

²⁵² [1989] 3 WLR 969. An earlier authority is *In re Californian Fig Syrup Company's Trade Mark* (1889) LR 40 Ch D 620 (a company could not acquire a trade mark under an international treaty when it had failed to comply with a specific statutory procedure governing the acquisition of the right). See also *Malone v Metropolitan Police Commissioner* [1979] Ch 344.

²⁵³ Above n 255, 890.

- (c) The provisions of an Act of Parliament prevail over inconsistent provisions in an international treaty

It is clear that, where the provisions of a treaty are inconsistent with the provisions of an Act of Parliament, the statute prevails²⁵⁴. In the absence of inconsistency, however, there is no impediment to the importation of treaty rights into domestic law through the exercise of Crown prerogative.

- (d) The use of treaties in statutory interpretation

While treaties may not be directly imported into domestic law, they may be used to assist in statutory interpretation. In *Ashby Richardson J* said:²⁵⁵

[i]t has been increasingly recognised in recent years that, even though treaty obligations not implemented by legislation are not part of our domestic law, the Courts in interpreting legislation will do their best conformably with the subject-matter and the policy of the legislation to see that their decisions are consistent with our international obligations.

The English courts have considered the importation of rights under the European Convention on Human Rights²⁵⁶ in several cases which have addressed the scope of the rule of statutory interpretation that treaty law and domestic law should be read consistently with each other. Some cases²⁵⁷ approve a broad principle that the provisions of a treaty must be taken into account by domestic courts unless a domestic statute clearly conflicts with the treaty provisions. Other cases²⁵⁸ support a narrower proposition.

²⁵⁴ *Mortensen v Peters* above n 212, 100; *Collico Dealings Ltd v IRC* [1962] AC 1; [1961] 1 All ER 762; *Cheney v Conn*, above n 212, 781; see also Bradley, 63.

²⁵⁵ Above n 186, 229. See also *Van Gorkom v Attorney-General* [1977] 1 NZLR 535, 542 - 543 per Cooke J.

²⁵⁶ The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 Rome, 4 November 1950, UNTS 222. The European Convention on Human Rights was concluded under the auspices of the Council of Europe, a larger and quite different body to the European Economic Community (EEC). By virtue of s 2(1) of the European Communities Act 1972 (UK), which applies to the EEC, enforceable community rights take effect directly in English law and are enforceable in English courts. Different rules apply to the European Convention on Human Rights, however. There is no legislative provision which directly imports the contents of that convention into English law. See Halsbury vol 8 Foreign Relations Law para 1629 p 841 and vol 51 European Communities para 1.09 p 18.

²⁵⁷ *R v Secretary of State for Home Affairs, ex p Bhajan Singh* [1976] QB 198 (CA); *R v Secretary of State for the Home Department, ex p Phansopka* [1976] QB 606; [1975] 3 All ER 497 (CA): "[I]t is now the duty of our public authorities in administering the law, including the Immigration Act 1971, and of our courts in interpreting and applying the law, including the Act, to have regard" to the European Convention on Human Rights: per Scarman LJ, 511, cited to All ER. See also *Ahmad v Inner London Education Authority* [1978] QB 36; *Garland v British Rail Engineering Case 12/81* [1983] 2 AC 751 (HL).

²⁵⁸ *R v Chief Immigration Officer, ex p Salamat Bibi* [1976] 3 All ER 843 (CA);

For example in *Brind v Secretary of State for the Home Department*²⁵⁹ the principle that the courts must have regard to the principles of international conventions in construing domestic legislation was reduced to a "mere canon of construction which involves no importation of international law into the domestic field"²⁶⁰, to be resorted to only in the case of ambiguity in domestic legislation. The New Zealand cases support the broader principle that the requirement for consistency between domestic and international law is a general rule of interpretation, which applies except where the domestic statute is capable of bearing only one meaning, and that meaning is inconsistent with the provisions of the international treaty.

(e) Summary of the authorities

It is submitted that there is nothing in the authorities which is directly inconsistent with the proposition that treaty obligations may be imported into domestic law through the exercise of prerogative powers. The earlier authorities confine the prohibition on the direct importation of treaty rights and obligations to situations where private rights would be affected, or where there is a conflict between the provisions of a treaty and a domestic statute, or both²⁶¹. These earlier authorities do not support broader statements of principle that treaty obligations may be imported into domestic law only by Parliamentary legislation. Those statements are better taken as authority for a prohibition on direct *judicial* importation of treaty obligations, rather than a prohibition on indirect importation by "prerogative legislation".

Stephen J, in *Simsek*²⁶², extended the prohibition to importation by executive action and identified the area of constitutional principle which was relevant, but, it is submitted with respect, got it wrong because he failed to take into account the Crown's residual power to "legislate". It is therefore submitted that the statement of the law contained in *Benipal*²⁶³ is correct.

²⁵⁹ [1991] 1 All ER 720 (HL).

²⁶⁰ Above, per Lord Bridge, 723.

²⁶¹ See, for example, *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 (PC) where Lord Atkin said, 347: "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, *if they entail alteration of the existing domestic law*, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes". Emphasis added.

²⁶² Above n 186.

²⁶³ Above n 21, 264. See Part III B2 above.

5 *Can the Refugee Convention be imported into domestic law through the exercise of Crown prerogative?*

There is no set form for "prerogative legislation"²⁶⁴. The Crown has imported the Refugee Convention into domestic law by Cabinet decision²⁶⁵. This is sufficient to meet the definition of "prerogative legislation" used in this paper (the making of new law by the Crown by formal decision or declaration)²⁶⁶.

The validity of the thesis that the Refugee Convention is now part of domestic law through the exercise of Crown prerogative depends on whether the method of transformation and the provisions of the Refugee Convention are compatible with the principles and rules of constitutional law relating to the exercise of the prerogative and to the relationship between domestic and international law. The provisions of the Refugee Convention are tested below against these principles.

The first principle, that the prerogative may be exercised only in an area where prerogative powers exist, is met by the provisions of the Refugee Convention. The Convention deals with the status of refugees and their right not to be sent back to a place where they may be persecuted. This is essentially a matter to do with the prerogative power to restrain aliens from entering the country. In setting up an internal section within the New Zealand Immigration Service of the Department of Labour and in setting up the Refugee Status Appeals Authority, the Crown has "legislated" pursuant to its prerogative power regarding aliens and has not sought to extend this power²⁶⁷. The implementation of the Convention is a matter which falls within the "pure and strict" category of prerogative powers.

²⁶⁴ Halsbury, above n 211.

²⁶⁵ By establishing ICOR in 1978 (see Part II); by establishing the RSS and the RSAA (then called the Refugee Status Appeals Committee (RSAC)) in 1990 (CAB (90) M 46/22); and by establishing new Terms of Reference for the RSAA in 1991 (CAB (91) M 9/14 and the decision of the Minister of Immigration made on 18 March 1992; see above n 106). All these decisions charged the decision-makers with the responsibility of determining whether refugee applicants are refugees as defined in the 1951 Convention. In setting up ICOR, the Government acted with the intention of fulfilling its international obligations under the Convention: *Benipal*, above n 21, 235 - 237; in sending an outline of these procedures to UNHCR, the Government was officially representing that New Zealand's domestic law complied with the Convention: above, 243. It is submitted that the adoption of the Convention is complete if its contents are, by virtue of statute or prerogative action, provided for in New Zealand law, without verbatim adoption of the provisions of the Convention.

²⁶⁶ In *Silke Ali v Minister of Immigration*, above n 119, Barker J noted, 7, that the RSAA had been "solemnly ... established by Government decree". It is submitted that this is an alternative definition of "prerogative legislation".

²⁶⁷ Bradley, 249 - 250 and 417.

The second principle, that the prerogative may be used as the source of authority for an action only if there is no statute which covers the area, is also met in the case of the Refugee Convention. It is true that the Immigration Act covers almost every aspect of the process by which aliens generally enter, stay and are removed from or leave New Zealand²⁶⁸. However, the Act does not deal with the entry, presence or removal of refugees²⁶⁹ as a specific, distinct and legally defined class of aliens. The principle confirmed in *de Keyser*²⁷⁰ and *Laker*²⁷¹, that where Parliament does not expressly reserve prerogative powers to itself when legislating in an area where the prerogative operates, the statute supersedes the prerogative for the time being, is therefore no impediment to the thesis. In *Chandra* and *Lucas v Coleman*, it was accepted that a residual area of prerogative power still exists in the immigration area, notwithstanding the existence of legislation.

The rule of statutory interpretation that a Court will interpret legislation "in conformity with New Zealand treaty obligations for it is to be assumed that Parliament legislates in accordance with its international obligations"²⁷² subject to the clear wording of the statute²⁷³, is met in this case. There is no conflict between the provisions of the Refugee Convention and the provisions of the Immigration Act or settled common law. The Convention requires that refugee applicants must have their status determined by contracting parties and that refugees may not be *refoulé*. The Immigration Act sets out the conditions under which aliens may enter, remain in, and be removed from New Zealand. There is nothing in the Immigration Act which authorises or compels the *refoulement* of refugees or which is inconsistent with mandatory access to a fair refugee status determination procedure.

Indeed the Act is almost silent on the subject of refugees. Since the Minister has established a firm non-statutory procedure for refugee determination, it is to be assumed that it was intended that this special area of immigration law was to be dealt with as additional to the statutory provisions, not in conflict with them. The arrival of spontaneous refugee applicants is a new problem for the government to deal with²⁷⁴. Parliament had the opportunity to deal with this new problem by way of legislation in

²⁶⁸ *Chandra v Minister of Immigration*, above n 197.

²⁶⁹ Except in section 18(6)(a) which refers to refugee travel documents issued under the Refugee Convention, as defined in section 2(1).

²⁷⁰ Above n 206.

²⁷¹ Above n 189.

²⁷² NZ Commentary above n186, Binder F, Chapter 149, Statutes, para C 870, p 28 citing *Van Gorkom v Attorney-General* [1977] 1 NZLR 543 per Cooke J (affd [1978] 2 NZLR 387) and *Levave v Immigration Department* [1979] 2 NZLR 74, per Somers J at 79. See also *Ashby*, above n .

²⁷³ Above. See also the discussion of *Brind*, Part III E3.

²⁷⁴ See Part I B above regarding the causes of the problem.

1987 and in 1991 and chose not to do so. Therefore there can be no suggestion that the Crown is attempting to do by prerogative what it already has power to do under existing legislation. The Immigration Act and the refugee determination procedures are complementary; the Convention does not conflict with the legislation.

Support for this view may be found in the decision of the Court of Appeal in *D v Minister of Immigration*²⁷⁵. Cooke P, delivering the judgment of the Court, said:²⁷⁶

As to [the] argument about the purpose of s 128, the section is certainly being used here for 'turn around' purposes and we see no reason why, while a person unlawfully in New Zealand is detained under the section, investigation of questions of refugee status, which might lead to a permit, should not be undertaken.

Support for this position is also found in the submission made in *Benipal* on behalf of the Ministers that "the decision to grant or refuse refugee status is wholly distinct and separate from the exercise of powers under the Immigration Act"²⁷⁷. Chilwell J's finding that the Ministers were exercising statutory powers of decision, since the granting of refugee status and the granting of a permit were "inseparable"²⁷⁸ accepts that there are two separate processes, and supports the proposition that the refugee determination procedures and the provisions of the Act are complementary²⁷⁹.

The requirement for legislation is obviously a sensible one where commercial treaties are being considered. However, the Refugee Convention deals with an area of law which is concerned with the recognition of a particular status held by people, not with the taking away of rights already accrued under statute or at common law. There are good reasons not to draw a distinction between the granting and the taking away of rights in the commercial area, because the conferring of property rights by treaty could lead to a great deal of confusion in the commercial world.

However, different considerations apply with respect to international human rights conventions which establish "human rights" rather than "private rights". The

²⁷⁵ Above n 152.

²⁷⁶ Above, 675. Indeed in that case, the Court of Appeal noted that the immigration officials were prepared to classify the applicants as refugees under the provisional Gulf War procedures; the problem for the applicants was that the police would not give them a security clearance. Judicial authority therefore establishes that the Act and the procedures established under the prerogative are separate but compatible provisions. Article 33(2) of the Convention specifically contemplates the return of refugees where security is an issue.

²⁷⁷ Above n 21, 244. These views were expressed as part of the Crown's submission that the Minister was not exercising a "statutory power of decision" and that his decision was therefore unreviewable.

²⁷⁸ Above, 247.

²⁷⁹ Compare *Laker*, in which the legislation did cover the field, directly and comprehensively. Lord Roskill said (206) that "the prerogative power and the power under the municipal law [could not] march side by side each operating in its own field".

importation of requirements in the human rights area is unlikely to affect the existing statutory or common law rights of citizens and which, in New Zealand, could not drastically alter domestic law in any case²⁸⁰.

Thirdly, the exercise of the prerogative in this case does not affect the private rights of New Zealand citizens as established by statute or finally-determined common law. The granting of refugee status to aliens has nothing to do with the existing private rights of New Zealand citizens.

Finally, the rule that treaties do not directly confer rights on citizens is not relevant when considering the Refugee Convention. A refugee seeking enforcement of the obligations imposed on the Government to determine an application for refugee status and not to return the refugee to persecution in the country of origin is seeking to enforce *domestic rights* established by "prerogative legislation". The Refugee Convention is now part of New Zealand law.

It is submitted that in any case the "private rights" principle is not contravened because of the nature of international treaties which deal with human rights. Internationally recognised human rights are not "private rights" in the sense in which that term is used in cases like *The Parlement Belge* but are "public rights"²⁸¹. Nevertheless, they are legally recognised rights and it is the central function of the courts to protect the legal rights of individuals²⁸². Where international instruments seek to do this, if no alteration of domestic statute law or common law is required, and the existing private rights of citizens are not affected, the courts should seek to give effect to such instruments in their decisions²⁸³. A distinction between the *granting* of rights or benefits by prerogative power and the *violation* of individual rights by prerogative power has also been judicially recognised²⁸⁴.

²⁸⁰ One hopes. In many of the cases in which the argument that international treaties should be judicially noticed has been rejected by a domestic court, the court has also found that the provisions of the treaty were not infringed by the domestic decision-maker in any case. This is true of *Simsek v Minister of Immigration and Ethnic Affairs* (1982) 40 ALR 61 (HCA); *Kioa v Minister of Immigration and Ethnic Affairs* above n 242; *Brind* above n 262; *R v Secretary of State for Home Affairs, ex p Bhajan Singh* above n 260; *Leuluai and Leuluai v Minister of Immigration* below n 332; *Vaematahau v Maxwell* below n 331.

²⁸¹ See above Part IIIC4(a)(ii).

²⁸² *Cane*, above n 245, 697.

²⁸³ This point is made by Elkind and Shaw, above n 210, 243 - 244.

²⁸⁴ *R v Secretary of State for the Home Department, ex p Northumbria Police Authority* above n 206: "It is well established that the courts will intervene to prevent executive action under prerogative powers in violation of property or other rights of the individual where this is inconsistent with statutory provisions providing for the same executive action. Where the executive action is directed towards the benefit or protection of the individual, it is unlikely that its use will attract the intervention of the courts ...", 571 per Purchas LJ. The granting of refugee status is in any case technically a privilege and not a right, in the

6 *Implications of the thesis that treaty rights may be imported into domestic law through the exercise of Crown prerogative*

It is submitted that through the exercise of the prerogative the Refugee Convention has been transformed into municipal law in New Zealand. What are the implications of this transformation for the Crown, for refugees and for the constitution? For refugees, the transformation of the Convention into domestic law gives refugees the ability to directly enforce the provisions of the Convention in the courts in New Zealand. This is important, because refugees have no effective remedy at international law²⁸⁵.

The adoption of the Refugee Convention as domestic law means that the discretionary powers of decision contained in the Immigration Act relating to detention and turnaround of those who arrive in an irregular manner apply according to their tenor only to "illegal immigrants". This is a different class of aliens to refugees. If an arrival claims refugee status, that person may not be detained and "turned around" under section 128. A refugee applicant must be given the opportunity to have her claim to refugee status determined fairly.

Nor may a person who arrives "lawfully" and subsequently claims refugee status be removed under Part II of the Act without having her claim determined. If refugee status is recognised, the refugee may not be returned to persecution. A person detained under section 128B of the Act also has the right of access to the determination procedure, although if she is judged to be a danger to the security of New Zealand, she may be subject to *refoulement* according to article 33 (2) of the Convention.

For the Crown, the implications are uncertain. The exercise of the power of the Crown to legislate in this area has broader constitutional implications. The concern that prerogative powers should not be extended, and that the Crown may not govern through the exercise of prerogative powers except where that prerogative power has existed since 1688 still has relevance, although the possibility of abuse is sourced not in the authority of the sovereign but in the institution of Cabinet²⁸⁶.

While the adoption of treaty provisions through the exercise of prerogative powers is legally possible, that does not make it constitutionally desirable. Nevertheless, the likelihood that other treaties will satisfy the very narrow criteria under which treaty

same way that the compensation granted in *R v Criminal Injuries Compensation Board ex p Lain* above n 209, was technically an *ex gratia* payment and not a right (Wade, above n 185, 242)

²⁸⁵ Part I D2 above.

²⁸⁶ *Fitzgerald v Muldoon*, above n 224; see also Bradley, 53 - 55.

obligations may be incorporated into municipal law by exercise of the prerogative is small. Commercial treaties will almost always affect private rights. The sorts of treaties which would satisfy the criteria applicable are those which deal with human rights rather than property rights; the effect on New Zealand citizens is therefore likely to be beneficial rather than detrimental²⁸⁷. The requirement for formal adoption and publication of "prerogative legislation" also provides some minimal accountability. It is submitted that the adoption of treaty provisions by "policy decisions", as proposed by Elkind and Shaw²⁸⁸, does not provide for sufficient accountability by the executive.

The second implication arises from the nature of prerogative legislation. If the Crown may legislate by virtue of the prerogative (in a very limited area), then it may legislate to incorporate the provisions of a treaty. However, although "prerogative legislation" is legislation, it is subject to somewhat different rules to Parliamentary legislation. As the *Case of Proclamations*²⁸⁹ established, "prerogative legislation" is subject to control by the courts (provided it is done in an area which is justiciable) in a way which Acts of Parliament are not.

In incorporating the provisions of the Convention by exercising the prerogative, the Crown may in fact have less flexibility to act than it would have if legislation had been passed. The standards of behaviour imposed by the courts may be somewhat higher than the standards which Parliament would have inserted into an Act of Parliament, had it chosen to legislate in this area. Certainly the decisions of the Refugee Status Appeals Authority indicate that the requirements of the Convention will be strictly enforced by that body, and attempts to cut down the effect of those requirements through administrative action²⁹⁰ have been decisively rejected by the Authority.

The third implication is that, if the courts can control "prerogative legislation" in this way, the principles espoused by the courts on the Refugee Convention and the procedures set up to implement it then become part of the common law of New Zealand. Since "prerogative legislation" is subject to the control of the courts, it is arguable that subsequently these judicial decisions may not be able to be overridden by a further use of the prerogative attempting to "de-adopt" the provisions of a treaty. The effect of this judicial recognition of domestic enforcement of international treaties through the exercise of the prerogative would be similar to the effect of *stare decisis* on rules of customary

²⁸⁷ See Elkind and Shaw, above n 210, 243.

²⁸⁸ Above, 235, 240. This is recognised at 243.

²⁸⁹ Above n 222.

²⁹⁰ See Part II A2(d) above.

international law²⁹¹. Since the Crown cannot make common law, it could be argued that the judicial decisions recognising the Convention as part of municipal law could be altered only by Act of Parliament.

This means that while the detail of the refugee determination procedures could be changed, any alteration could not derogate from the requirement that a fair refugee status determination procedure must be in existence, and that refugees may not be returned or *refoulé* to a place where they may face persecution.

C *Incorporation of the Customary Rule of Non-Refoulement into New Zealand law*

The second way in which the Refugee Convention has been incorporated into New Zealand's domestic law is through the operation of customary international law. Customary rules of international law:²⁹²

are considered to be part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority.

Non-refoulement is a customary rule of international law²⁹³ and as such is incorporated into and forms part of the law of New Zealand²⁹⁴.

For the purposes of this paper, the extent of the obligation of *non-refoulement* as a customary rule of international law is considered to be co-extensive with the provisions of Article 33 of the Refugee Convention. Although earlier in this paper the obligation of *non-refoulement* and the requirement to establish a determination procedure are treated as separate obligations, the second requirement really flows from the first. Before a decision can be made about whether to return a person claiming refugee status, one needs to determine if that person is a Convention refugee. The customary rule of international law prohibiting *refoulement* therefore includes the requirement to establish a determination procedure²⁹⁵.

²⁹¹ Brownlie *Public International Law* 44. On the point whether obsolete rules of international law are binding, see *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529; [1977] 1 All ER 881 per Lord Denning MR cited to All ER 889 - 890.

²⁹² Brownlie *Public International Law* 43.

²⁹³ See J F Hartman "The Principle and Practice of Temporary Refuge: A Customary Norm Protecting Civilians Fleeing Internal Armed Conflict" in Martin *Asylum Seekers*, 87 and the discussion in Part I above regarding the extent of the obligation.

²⁹⁴ Halsbury, vol 18 para 1403.

²⁹⁵ The good administration of justice is also a general principle of international law. This requires that decisions be made fairly and in accordance with natural justice in any case: Plender *Asylum* 83.

Brownlie notes²⁹⁶ that the cases decided since 1876 are interpreted by some authorities in such a way as to displace the doctrine of (direct) incorporation of customary international law by that of (indirect) transformation. The doctrine of transformation holds that customary international law is part of domestic law only if the rules have been clearly adopted and made part of the law of England by legislation, judicial decision, or established usage. Brownlie concludes that "[t]he authorities, taken as a whole, support the doctrine of incorporation, and the least favourable dicta are equivocal to say the least"²⁹⁷. In the absence of any authority to the contrary, it is submitted that the doctrine of incorporation correctly represents the law of New Zealand.

In order to be recognised as a customary rule of international law, a legal principle must be reflected in general, uniform and consistent state practice of sufficient duration and must be adhered to by states out of a sense that the practice is legally obligatory (*opinio juris*)²⁹⁸. The weight of authority is now in favour of the proposition²⁹⁹.

Stenberg, for example, finds³⁰⁰ that states which are not parties to the Convention nevertheless do not generally consider that they have a right to *refouler* refugees; that virtually no states have formally opposed General Assembly resolutions on the subject; and that attempts to deny entry to refugees are normally justified on the basis that the people concerned are illegal immigrants, not refugees, or are a security risk. On this basis, and following an examination of state practice, he concludes that "there is ample evidence for the contention that the principle of *non-refoulement* has become a general rule of customary international law"³⁰¹.

Plender notes that while "the principle of *non-refoulement* has been placed under some strain and efforts have been made on the part of several States to diminish its effect, [t]he latter serve, however, to underscore the growing, if reluctant, practice of acknowledging

²⁹⁶ *Public International Law*, 43.

²⁹⁷ Above, 47. Halsbury (above n 297) appears to have retreated from the position that customary rules must be adopted and now poses both (direct) incorporation and (indirect) transformation as arguable.

²⁹⁸ *North Sea Continental Shelf Cases* ICJ 1969 1. For a recent discussion of these requirements, see I R Gunning "Modernising Customary International Law: The Challenge of Human Rights" (1991) 26 *Va J Int'l L* 211.

²⁹⁹ Among those who consider that the obligation is a rule of customary international law are D W Greig "The Protection of Refugees and Customary International Law" 8 *Austl YB Int'l L* 108, 132, 135, 141 (1983); D Perluss and J F Hartman "Temporary Refuge: Emergence of a Customary Norm" (1986) 26 *Va J Int'l L* 551; D A Martin "Large Scale Migrations of Asylum Seekers" 76 *Am J Int'l L* 598, 599 (1982). Greig states (132) "[s]ince [1969] the crucial issue is not so much as to the existence of the principle but as to its scope". A Grahl-Madsen *Territorial Asylum* (1980) 42 considered that the obligation of *non-refoulement* was not a rule of customary international law. See also B S Tsamenyi "The Position of Non-Parties to the Refugee Convention" [1981] *Melanesian LJ* 57.

³⁰⁰ G Stenberg *Non-Expulsion and Non-Refoulement* (1989) 176 - 178.

³⁰¹ Above 279.

the existence of the principle as a binding obligation"³⁰². The UNHCR Executive Committee in 1982 reaffirmed that the principle was "progressively acquiring the character of a peremptory rule of international law"³⁰³. According to Plender, the fact that UNHCR could make this "somewhat audacious" assertion "lends credence and weight to the argument that the principle of *non-refoulement* has matured into a rule of customary law, at least"³⁰⁴.

Domestic law will be interpreted consistently with customary rules of international law, unless the clear wording of a statute or binding judicial decision is inconsistent with the customary rule:³⁰⁵

On any judicial issue [the courts] seek to ascertain what the relevant rule [of general international law] is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

It has been established in Part IIIC above that the provisions of the Refugee Convention, including the duty of *non-refoulement*, are consistent with the Immigration Act and that there is no finally-determined common law which conflicts with the Convention. This being the case, there is no impediment to the incorporation into domestic law of the customary rule of international law that states have a duty of *non-refoulement* towards refugees.

D *The Convention as a Mandatory Relevant Consideration in Immigration Decision-Making*

In *Ashby*, Cooke and Somers JJ left open the possibility³⁰⁶ that in a particular case, an international convention may be of such overwhelming importance that it would have to be taken into account when a decision-maker exercised the power to make a decision. It is submitted that the Refugee Convention is a relevant consideration which the Minister or the NZIS must take into account in making decisions under the Immigration Act

³⁰² R Plender *International Migration Law* (2 ed, 1988) 430.

³⁰³ Report on the Thirty-Third Session of the Executive Committee of the High Commissioner's Programme, 21 October 1982, UN Doc A/AC.96/614, para 70(1)(b), p 18.

³⁰⁴ Above. Goodwin-Gill ("*Non-Refoulement and the New Asylum-Seekers*" (1986) Va J Int'l L 898, 902) contends that the principle of *non-refoulement* extends not only to Convention refugees, but also to all displaced persons who do not enjoy the protection of their country of origin. This controversial assertion has not gained universal acceptance and has been challenged vigorously by Hailbronner, who concedes only that the customary rule "may protect a limited class of refugees who would be subject to torture upon return to their home countries": "*Non-Refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking?*" (1986) Va J Int'l L 858.

³⁰⁵ *Chung Chi Cheung v The King* [1939] AC 160 per Lord Atkin at 167 - 168.

³⁰⁶ Above n 186, 226 and 234.

where a question of refugee status arises, except where a question of security is concerned. Effectively, this makes the Convention part of New Zealand's domestic law.

This section begins by confirming that immigration is a justiciable area and that the discretionary powers exercised in the immigration area are reviewable, then looks at the problems posed for this part of the thesis by the House of Lords' decision in *Brind v Secretary of State for the Home Department*³⁰⁷, and finally summarises the reasons why the Refugee Convention is a mandatory relevant consideration in immigration decision-making.

1 *Immigration is a justiciable area*

Immigration is a justiciable area. Nevertheless, the courts have been slow to intervene in this area which is allied to matters of foreign policy³⁰⁸. The comments of Richardson J on this point in *Ashby*³⁰⁹ are still "very relevant":³¹⁰

Immigration policy is a sensitive and often controversial political issue. . . . The absence of any particularisation is some indication that the legislature regarded the determination of the national interest in the exercise of the discretion a matter for decision in the round by the executive.

However, unlike the area of security, where the courts will never intervene³¹¹, there are circumstances in which the courts will review executive and administrative action in the immigration area³¹². The "national interest" aspect of immigration policy may in some circumstances be offset or outweighed by the seriousness of the consequences of immigration decisions on people's lives.

In *Bugdaycay v Secretary of State for the Home Department*³¹³, the House of Lords quashed an order by the Secretary of State that a Ugandan citizen be returned to Kenya, where he had been living, on the basis that it could not be shown that Kenya would respect the *non-refoulement* provisions of the Convention, even though Kenya was a

³⁰⁷ Above n 262.

³⁰⁸ Taylor *Judicial Review*, para 1.37 p 26.

³⁰⁹ Above n 186, 230 and 231.

³¹⁰ *Behari v Minister of Immigration* [1990] 3 NZLR 558 (CA).

³¹¹ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); [1984] 3 All ER 935 cited to All ER; *D v Minister of Immigration* above n 152; *R v Home Secretary, ex p Hosenball* [1977] 1 WLR 766.

³¹² See *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130; *Chandra v Minister of Immigration*, above n 197; see also Wade, 577 - 579.

³¹³ [1987] AC 514; [1987] 1 All ER 940.

party to the Convention. In that case, the Immigration Rules³¹⁴ directly imported the terms of the Refugee Convention, making it an obligatory relevant consideration.

There was clear evidence that if the appellant was removed to Kenya, the Kenyan authorities may well remove him to Uganda where he feared persecution³¹⁵. Lord Bridge made the following general observations:³¹⁶

Within . . . [the limitations on the scope of the court's power to review] the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.

The courts will scrutinise immigration decisions to ensure that they are made fairly³¹⁷. Given the nature of the subject matter, however, the courts are more likely to intervene where the grounds for review are illegality or procedural unfairness rather than unreasonableness since too close a study of unreasonableness can lead into a discussion of the merits of the case, which is not a function of the courts³¹⁸. However where the consequences of a decision could be a threat to the applicant's life or freedom, the courts may be prepared to find that a decision is unreasonable³¹⁹.

2 *Discretionary powers are reviewable*

Under the Immigration Act 1987³²⁰, the Minister's power to grant a temporary permit under section 9 (or a residence permit under section 8) is a matter of discretion. The power to grant a permit under the Immigration Act is a statutory power of decision³²¹ reviewable under section 4 of the Judicature Amendment Act 1972. The Immigration Act states clearly that the power is a discretionary power. The powers under sections

³¹⁴ The Immigration Rules are rules of practice made by the Home Secretary under the Immigration Act 1971. They contain administrative instructions and statements of policy and practice. Their legal effect is somewhat uncertain: Wade, 225 - 226 and 858 - 859. The relevant rules in *Bugdaycay* were section 1, paragraph 16 which provided that "[n]othing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under [the Refugee Convention and Protocol]" and paragraph 73 which stated: "Leave to enter will not be refused if removal would be contrary to the provisions of the Convention and Protocol Relating to the Status of Refugees": above 944.

³¹⁵ Above, per Lord Bridge, 953.

³¹⁶ Above, foreshadowing his remarks in *Brind*, above n 262.

³¹⁷ See the authorities cited at n 315; see also *Mohu v Attorney-General* [1983] 4 NZAR; and the NZIS *Manual* Chapter 3.

³¹⁸ *Kumar v Minister of Immigration* [1991] NZAR 555 (HC), 559, per Anderson J.

³¹⁹ The dictum of Lord Bridge in *Brind* above n 262, 723 adopts this reasoning.

³²⁰ Previous legislation gave the Minister similar discretion.

³²¹ As defined in s 3 of the Judicature Amendment Act 1972, and see *Chandra*, above n 197.

128 - 128B of the Act are also discretionary, as are the removal powers contained in Part II of the Act.

Control over a discretionary administrative power may be exercised by judicial review on grounds of illegality, irrationality and procedural impropriety³²². No discretionary power is unfettered (although the subject matter of the decision may be unjusticiable):³²³

Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends on the true intent and meaning of the empowering Act.

3 *The problem of Brind*

In *R v Secretary of State for the Home Department, ex p Bhajan Singh*³²⁴, Lord Denning recognised³²⁵ that international conventions could be mandatory relevant considerations in the immigration area. But he later retreated from this position. In *R v Chief Immigration Officer, ex p Salamat Bibi*³²⁶, he said:

I desire, however, to amend one of the statements I made in [*Singh*]. I said then that the immigration officers ought to bear in mind the principles stated in the convention. I think that would be asking too much of the immigration officers ... [I]t is much better for us to stick to our own statutes and principles, and only look to the convention for guidance in case of doubt.

The argument that the European Convention on Human Rights is a mandatory relevant consideration in decision-making in England was recently rejected in *Brind v Secretary of State for the Home Department*³²⁷. In that case, the Home Secretary exercised statutory and contractual powers to direct the BBC and the Independent Broadcasting Authority (IBC) to refrain from broadcasting the direct statements of certain proscribed organisations in Northern Ireland. Brind and several other journalists applied for review of the Home Secretary's decision on several grounds, including the ground that he had acted in breach of the right to freedom of expression recognised by article 10 of the European Convention on Human Rights.

³²² *CCSU* above n 314.

³²³ Wade, above n 185, 399.

³²⁴ Above n 260.

³²⁵ Above, 1083. In relation to the European Convention on Human Rights, he said that "immigration officers and the Secretary of State in exercising their duties ought to bear in mind the principles stated in the convention. They ought ... to have regard to the principles in it - because, after all, the principles stated in the convention are only a statement of the principles of fair dealing; and it is their duty to act fairly".

³²⁶ Above n 261.

³²⁷ Above n 262.

The appellants put forward an unsuccessful argument³²⁸ that:

when a statute confers upon an administrative authority a discretion capable of being exercised in a way which infringes [a convention right], it may similarly be presumed that the legislative intention was that the discretion should be exercised within the limitations which the convention imposes.

Lord Bridge said³²⁹ that this went beyond the resolution of an ambiguity; not only would this principle require that administrative decisions should be exercised in conformity with the convention, it would also require the courts to "[import] into domestic administrative law ... the text of the convention and the jurisprudence of the European Court of Human Rights". Lord Ackner said³³⁰ that if the submission that the convention was a mandatory relevant consideration was accepted

this inevitably would result in incorporating the convention into English domestic law by the back door. It would oblige the courts to police the operation of the convention and to ask itself in each case, where there was a challenge, whether the restrictions were 'necessary in a democratic society'

The argument that the Minister of Immigration was obliged to take into account the International Covenant on Civil and Political Rights (ICCPR) was rejected by the High Court in New Zealand in *Vaematahau v Maxwell*³³¹ and in *Leuluai and Leuluai v Minister of Immigration*³³². In *Leuluai*, Savage J said simply that³³³ "I doubt if enforcing the removal warrant would be in breach of the International Covenant, but in any event it had no application". It is obvious from both these judgments that the issue was not argued in any detail³³⁴. For that reason, it is not considered that they would preclude a finding that the Refugee Convention is a mandatory relevant consideration if this submission were put forward in a comprehensive way.

³²⁸ Above 723.

³²⁹ Above.

³³⁰ Above, 735. Lord Ackner does not explain why this task, which is undertaken by courts in the United States, Canada, Germany and many other countries in the world, is beyond the abilities of the English courts.

³³¹ Unreported, 1 September 1992, High Court, Wellington Registry, CP 834/91, Jaine J.

³³² Unreported, 29 June 1991, High Court, Wellington Registry, CP 392/91, Savage J.

³³³ Above, 9.

³³⁴ The argument that ICCPR and the Declaration of the Rights of the Child were mandatory relevant considerations in immigration decision-making was rejected in *Kioa* (above n 242). *Kioa* is not persuasive on the point, however, because the Australian High Court found that the provisions of the Convention and Declaration had not been breached in any case and because the relevant statute provided only that it was "desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with" the Conventions. Brennan J considered that the statute therefore clearly stated that the conventions were permissible considerations. To hold that the Conventions were mandatory considerations would therefore have been in conflict with the domestic law, which must prevail in the event of inconsistency. The Conventions in that case were also more general than the provisions of the Refugee Convention.

The *Brind* decision is more of an obstacle, although a persuasive and not a binding obstacle. Nevertheless, it is submitted that it is not an insurmountable obstacle since its effect is limited to the European Convention on Human Rights for the reasons set out below.

(a) The relationship of the United Kingdom to Europe has altered the doctrine of the legislative supremacy of Parliament in England to an indeterminate extent. That doctrine is now a relative doctrine. English law and the law of New Zealand are to that extent different. It is submitted that because of the complexity of the English situation³³⁵ and because the law in this area is still developing, English decisions on matters of constitutional law should now be examined carefully before an automatic assumption is made that they are applicable to the law of New Zealand.

(b) The European Convention on Human Rights is a different sort of treaty to the Refugee Convention. The European Convention accords very general human rights to people. It covers a huge area of decision-making. It would be impossible, without a fundamental change in the way the English and New Zealand decision-makers and courts view fundamental human rights, for all those who make decisions to give practical meaning to provisions in such general instruments³³⁶.

The Refugee Convention, on the other hand, contains specific provisions relating to the rights of refugees and the duties of contracting states. These provisions are not aspirational, as are the provisions of the International Bill of Rights³³⁷. They are directly applied by states parties to actual refugee situations. The Refugee Convention was designed as a practical solution to the refugee problem as it existed in Europe after the Second World War³³⁸. Only those decision-makers in one area, immigration, have to take the Refugee Convention into account, and the concepts in the Refugee Convention are not theoretical or difficult to apply, but are practical and specific.

³³⁵ Above n 259.

³³⁶ In *Salamat Bibi* (above n 261) Geoffrey Lane LJ said (850): "One only has to read the article in question, art 8(2), to realise that it would be an impossibility for any immigration officer to apply a discretion based on terms as wide and as vague as those ...". The article in that case provided that "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of others".

³³⁷ Lawyers Committee for Human Rights *The Human Rights of Refugees and Displaced Persons: Protections Afforded Refugees, Asylum Seekers and Displaced Persons under International Human Rights, Humanitarian and Refugee Law* (1991), 12 and 13.

³³⁸ Part I B above, although it has since been extended to have continuing and global coverage.

(c) The European Convention on Human Rights, while it contains broadly drafted rights, is nevertheless one of the most widely used human rights conventions³³⁹. It also has an established and well-used complaints procedure which is available to individuals, through the European Commission on Human Rights to the European Court of Human Rights. This point was noted by Lord Bridge in *Brind*:³⁴⁰

When Parliament has been content for so long to leave those who complain that their convention rights have been infringed to seek their remedy in Strasbourg, it would be surprising suddenly to find that the judiciary had, without Parliament's aid, the means to incorporate the convention into such an important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.

By contrast, the Refugee Convention contains no enforcement procedure accessible to those affected by decisions about refugee status and *refoulement*. It can be enforced only internationally through UNHCR or judicially through municipal courts³⁴¹.

In addition, Lord Bridge made a proviso in *Brind* which left open the back door which Lord Ackner purported to close. Lord Bridge noted that the courts are not powerless to prevent the exercise of administrative discretion, even when conferred "in terms which are on their face unlimited"³⁴², in a way which infringes fundamental human rights:

[I]n deciding whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations, we are ... perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it. The primary judgment as to whether the particular competing public interest justifies the particular restriction ... falls to be made by the Secretary of State ... But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment.

According to Lord Bridge then, the question of fundamental rights and freedoms is an aspect of reasonableness which the courts will take into account. This is not so very different to the appellants' argument that the convention is a mandatory relevant consideration. Nor are the fundamental rights and freedoms recognised under English law³⁴³ so different to those set out in the International Bill of Rights or regional human rights conventions. If domestic courts can take fundamental rights and freedoms into

³³⁹ Lawyer's Committee for Human Rights, above n 340, 20. The *Brind* complaint was taken to, and rejected by, the European Commission on Human Rights. See *Application 15404/89 v Ireland* (1991) 88 LS Gaz, 23 October, p 44, noted in Halsbury's Annual Abridgment 1991.

³⁴⁰ Above n 262, 273.

³⁴¹ In addition, the Asia/Pacific region is the only region of the world without a regional human rights convention: The Legal Division, Commonwealth Secretariat "The Application of International Human Rights Standards in Domestic Law" in (1992) 22 VUWLR (Monograph No 4 "Essays and Documents on Human Rights in the Pacific") 4.

³⁴² Above.

³⁴³ Halsbury vol 8 paras 827 - 844 pp 547 - 558.

account in assessing the reasonableness of decisions, then it is submitted that whether they do so in recognition of "domestic" rights and freedoms recognised by the courts or whether they do so in recognition of rights and freedoms set out in international treaties is unlikely to make much difference to the result of judicial decisions in this area³⁴⁴.

It is therefore submitted that the courts are as well able to assess the reasonableness of decisions with respect to the extent to which those decisions affect the fundamental rights and freedoms provided for in international law as they are with respect to domestic rights and freedoms.

4 *The Refugee Convention as a mandatory relevant consideration in immigration decision-making*

In exercising a discretion, there are some considerations which must be taken into account by the decision maker; however, there are also other considerations which the decision maker may take into account, but which she is not obliged to take into account³⁴⁵. In *Ashby v Minister of Immigration*³⁴⁶, the Court of Appeal rejected the argument that the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 was a relevant factor which the Minister was obliged to take into account before exercising his discretion whether to grant a permit under the Immigration Act. Cooke J doubted whether the Convention was relevant at all³⁴⁷.

However, His Honour went on to say³⁴⁸ that in some circumstances, a factor, including an international convention, may be a mandatory relevant factor in immigration decision-making:

Nevertheless, even in statutes concerned with immigration and policy in that regard, I would not exclude the possibility that a certain factor might be of such overwhelming or manifest importance that Parliament could not possibly have meant to allow it to be ignored. Such a situation would

³⁴⁴ See above n 283, in which it is pointed out that in many of the cases where this argument has been mounted, the decision-maker has complied with the international obligations in any case.

³⁴⁵ *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

³⁴⁶ Above n 186.

³⁴⁷ Above, 226.

³⁴⁸ Above. See also Rt Hon Sir Robin Cooke "The Struggle for Simplicity in Administrative Law" in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s. Problems and Prospects* (1986) 13 - 14: "In ... [*Ashby* and *CREEDNZ*] it was also accepted or assumed that on a purposive construction of a statute a consideration not specified by the legislature may occasionally, in particular circumstances, be seen to be of such obvious relevance as to fall within the mandatory category ... Both the distinction for *Wednesbury* purposes between prohibited and permissive considerations and the existence on occasion of implied but obviously material mandatory ones were accepted in the House of Lords, per Lord Scarman, in 1984 in *In Re Findlay* [1985] AC 318".

shade into the area where no reasonable Minister could overlook a certain consideration or reach a certain result.

Somers J commented to similar effect that he was³⁴⁹

prepared to assume (without deciding) that in the exercise of that discretion there may be some matters so obviously or manifestly necessary to be taken into account that a Minister acting reasonably would be bound to take them into account.

The Refugee Convention is such a factor³⁵⁰. It is an implied mandatory consideration which must be taken into account when the discretion whether to grant a permit under the Immigration Act is being exercised. It must also be taken into account across the spectrum of immigration decision-making, including the exercise of discretionary powers of decision-making about the treatment of refugees who fall within the provisions of sections 128, 128A and 128B of the Immigration Act or decisions about removal under Part II of the Act. These are all "restrictions on entry"³⁵¹ or at least restrictions on the ability to remain in New Zealand. In practical terms this means that immigration officials must always take into account the refugee's right of access to the determination procedure and the duty of *non-refoulement*.

This is an area in which relevant considerations cannot be determined solely by looking at the statute. The Minister, by not legislating, but by choosing to deal with the matter under the prerogative, is effectively saying that this is an extra, non-statutory body of law which runs in tandem with the Immigration Act. The usual emphasis placed on the purpose, scope and policy of the statute³⁵² in assessing whether decisions have been made reasonably must be tempered in the area of refugee law as it currently stands in New Zealand. Having deliberately left a legislative vacuum in this area and having chosen to deal with refugee applications under a system set up by the exercise of prerogative powers, the Government cannot then contend that the statute covers the whole field and that non-statutory considerations need not be taken into account.

The Refugee Convention is an internationally-recognised and universal constraint on the right of states to control their borders. As Hathaway points out³⁵³, it functions as a

³⁴⁹ Above n 186, 234.

³⁵⁰ Indeed, Cooke J's proviso could have been made specifically with the Refugee Convention in mind.

³⁵¹ *Benipal*, above n 21, per Chilwell J.

³⁵² Wade, above n 185, 408, 412 - 413.

³⁵³ "Refugee law constitutes a narrow exception to [the] norm of autodetermination of immigration policy. [It] is a politically pragmatic means of reconciling the generalized commitment of states to self-interested control over immigration to the reality of coerced migration ... [G]overnments have recognized that if they are to maintain control over immigration in general terms, they must accommodate demands for entry based on particular urgency. To fail to do so is to risk the destruction to (sic) those broader policies of control, since laws and institutional arrangements are no match for the desperate creativity of persons in

safety valve which ensures the effectiveness of immigration laws generally. The need to take account of refugee flows generally and the provisions of the Refugee Convention in particular is now an integral part of the functioning of immigration law, policy-making and decision-making throughout the world. This is so whether that requirement is expressed in legislation such as the Immigration Act or whether it is implied by the international reality of and reaction to refugee flows.

In assessing the reasonableness of the exercise of a discretionary power under the Immigration Act, proportionality will also be a factor³⁵⁴. The decision in *Bugdaycay* can be seen in this light. The consequences of refusal of a temporary permit to an ordinary applicant are simply that the applicant must remain in her present situation. However, the consequences for a refugee of refusal of a permit may be loss of life or freedom or continual persecution or continual flight. For this reason, the Convention obligations must be taken into account in decision-making in this area.

It has been submitted that the provisions of the Refugee Convention and the Immigration Act are complementary and not in conflict. Because New Zealand is a party to the Convention, it must also be assumed by New Zealand courts that in the absence of clearly inconsistent domestic legislation, the Government intends to honour its international obligations³⁵⁵.

It is also submitted that even if the current refugee determination procedure had not been put into place, the Convention obligations would still be mandatory relevant considerations for decision-makers in the immigration area. In *Ashby* the Convention on Racial Discrimination was "of doubtful bearing on the subject"³⁵⁶ of the Minister of Immigration's discretion to grant permits to sports players. While the Convention on Racial Discrimination and the Refugee Convention both deal with international human rights obligations, the appellants' case in *Ashby* was built around the indirect effect of a domestic decision on people in another country.

Under the Refugee Convention, however, the courts must pronounce on the rights of people who are present in New Zealand, who have no remedy at international law and who are directly seeking the protection of the New Zealand state from persecution in their own countries under the terms of a Convention to which New Zealand is a party.

flight from serious harm. By catering for a subset of those who seek freedom of international movement, refugee law legitimates and sustains the viability of the protectionist norm": J C Hathaway *The Law of Refugee Status* (1991) 231.

³⁵⁴ Taylor, above n 311 para 14.44 p 343.

³⁵⁵ The Treaty of Waitangi may have a similar status: above, para 14.27 p 328.

³⁵⁶ Above n 186, 226.

The Refugee Convention is of direct, "overwhelming" and "manifest"³⁵⁷ relevance to immigration decisions made by the New Zealand authorities.

The very specificity of the obligations imposed by the Refugee Convention, its history as a instrument developed to deal with a real problem³⁵⁸ and the narrowness of its area of operation distinguish it from other international human rights conventions which may be aspirational rather than directly effective.

Judicial support for the contention that the Refugee Convention is a mandatory relevant consideration comes from the reasoning in *Benipal*. In *Benipal* Chilwell J concluded that:³⁵⁹

the decision of the Minister of Immigration was made on a preliminary issue the determination of which, favourably to Mr Benipal, would have required determination of his residence in New Zealand on a temporary or permanent basis ... Restrictions on entry and the Convention are inseparable.

His Honour found³⁶⁰ that Mr Benipal had legitimate expectations based *inter alia* on the existence of the New Zealand Procedures for the Determination of Refugee Status Under International Instruments sent to the United Nations and published by that international body in a summary form. These legitimate expectations were that his application for refugee status would be dealt with procedurally fairly and determined fairly; that his application, having been initially assessed as one which fell to be considered in terms of the definition of refugee, gave him prima facie grounds for claiming the status of refugee; and that he had bona fide and substantial grounds for claiming refugee status in terms of the definition of refugee and that he would receive a favourable decision.

Chilwell J appears to be saying that the international holding out by New Zealand that it had put the provisions of the Refugee Convention into effect was sufficient to create a legitimate expectation on the part of refugee applicants who arrive in New Zealand that the provisions of the Convention will be honoured in determination of that applicant's refugee status.

While it appears that, in *Benipal*, the argument that the Convention was an obligatory relevant consideration which must be taken into account when the discretion to grant a permit is exercised was never put before the court, in my opinion Chilwell J's finding

³⁵⁷ *Ashby*, above.

³⁵⁸ See J C Hathaway "The Evolution of Refugee Status in International Law: 1920 - 1950" (1984) 33 ICLQ348.

³⁵⁹ *Benipal*, above n 21, 247.

³⁶⁰ Above, 302 - 303.

that the Convention and restrictions on entry (ie the requirement to hold a permit under the Immigration Act) are inseparable amounts to the same thing.

The submission that the Refugee Convention is a mandatory relevant consideration in immigration decision-making is not likely to be tested as long as the current refugee status determination procedures are in effect and are operated fairly by NZIS. In the event that that the determination procedures are not operated fairly or are amended in such a way that the protections afforded refugee applicants are cut down, the submission that the Refugee Convention is a mandatory relevant consideration may need to be tested.

IV ENDING

This paper seeks to establish that the Refugee Convention (including its two most important requirements, the requirement to establish a fair determination procedure to assess whether asylum seekers are refugees as defined in the Refugee Convention and the duty of *non-refoulement*) is now part of New Zealand law.

Legislation in this area is nevertheless desirable³⁶¹. Judicial decision-making in this area of the law recognises that "[i]mmigration is a difficult field of public policy which is no doubt better regulated by Parliament than the courts"³⁶². The failure to legislate means that issues which have not been definitively pronounced on by the courts remain unresolved. This creates uncertainty for refugee applicants, for the non-governmental organisations working in this area, and for those who have the responsibility for making decisions on questions which may, literally, be matters of life and death.

³⁶¹ The arguments in favour of legislation are summarised comprehensively in the Legislation Advisory Committee submission on the Immigration Amendment Bill 1991 to the Labour Select Committee (August 1991), 6 - 11. The Wilson report (above n 94, 18 - 19 and 21) also states that legislation is desirable.

³⁶² Wade, 578.

The Convention and its Committee on the Rights of the Child have been instrumental in the development of a comprehensive system of international law for the protection of children. The Convention is the first legally binding instrument that sets out the rights of children and the obligations of States to protect and promote these rights. It is a landmark achievement in the history of international law and human rights.

The Convention is based on the principle that children are entitled to special protection and care because of their vulnerability and dependence. It recognizes that children have the same fundamental rights as adults, but that these rights must be adapted to their specific needs and circumstances. The Convention covers a wide range of rights, including the right to life, survival, and development; the right to a name and nationality; the right to family life; the right to education; the right to health care; and the right to protection from abuse and exploitation.

The Convention is a comprehensive and holistic approach to children's rights. It recognizes that children's rights are interconnected and interdependent, and that the best interests of the child must be the primary consideration in all actions concerning children. The Convention is a guiding principle for the development of national laws and policies, and for the work of international organizations and civil society.

The Convention is based on the principle that children are entitled to special protection and care because of their vulnerability and dependence. It recognizes that children have the same fundamental rights as adults, but that these rights must be adapted to their specific needs and circumstances. The Convention covers a wide range of rights, including the right to life, survival, and development; the right to a name and nationality; the right to family life; the right to education; the right to health care; and the right to protection from abuse and exploitation.

APPENDIX 1

EXECUTIVE COMMITTEE CONCLUSION ON DETERMINATION OF REFUGEE STATUS 1977¹

The Committee:

- (a) Noted the report of the High Commissioner concerning the importance of procedures for determining refugee status.
- (b) Noted that only a limited number of States parties to the 1951 Convention and the 1967 Protocol had established procedures for the formal determination of refugee status under these instruments.
- (c) Noted, however, with satisfaction that the establishment of such procedures was under active consideration by a number of governments.
- (d) Expressed the hope that all governments parties to the 1951 Convention and the 1967 Protocol which had not yet done so would take steps to establish such procedures in the near future and give favourable consideration to UNHCR participation in such procedures in appropriate form.
- (e) Recommended that procedures for the determination of refugee status should satisfy the following basic requirements:
 - (i) The competent official (eg immigration officer or border police officer) to whom the applicant addresses himself (sic) at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority.
 - (ii) The applicant should receive the necessary guidance as to the procedure to be followed.

¹ Report on the Twenty-Eighth Session of the Executive Committee of the High Commissioner's Programme (Geneva, 4 - 12 October 1977) A/AC. 96/549, Conclusion No 6, 14.

(iii) There should be a clearly identified authority - wherever possible a single central authority - with responsibility for examining requests for refugee status and taking a decision in the first instance.

(iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contract a representative of UNHCR.

(v) If the applicant is recognised as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.

(vi) If the applicant is not recognised, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.

(vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in that country while an appeal to a higher administrative authority or to the courts is pending.

APPENDIX 2

REFUGEE STATUS APPEALS AUTHORITY: TERMS OF REFERENCE (1 APRIL 1992)

Composition

1. The Authority shall comprise members appointed by the Minister of Immigration from time to time, consisting of a Chairperson from outside Government and such other independent members as are necessary for the Authority to operate as a number of divisions.
2. For the purpose of any one appeal two members of the Authority shall sit, being a Chairperson and one other member. The Chairperson may appoint where necessary one or more members as Chairpersons for the operation of divisions.
3. A representative of the United Nations High Commissioner for Refugees may sit on hearings where that representative so wishes, as a non-voting participant.
4. The Authority shall be serviced by a unit in the Refugee Status Section of the New Zealand Immigration Service, under the direction of the General Manager of the Service, and that unit shall serve as the Secretariat of the Authority.

Function and Jurisdiction

5. The Authority's function shall be to make a final determination on appeal from decisions of officers of the Refugee Status Section of the New Zealand Immigration Service of claims to refugee status, that is, to determine whether persons are refugees within the meaning of Article 1, Section A(2) of the 1951 Convention Relating to the Status of Refugees, as supplemented by the 1967 Protocol Relating to the Status of Refugees. It shall not be a function of the Authority to consider whether, in respect of claimants who are not refugees within the above meanings, there exist any humanitarian or other circumstances which could lead to the grant of a residence or other permit to remain in New Zealand.

6. The Authority shall consider only those claims to refugee status where the claimants have been declined refugee status by officers of the Refugee Status Section and are not otherwise granted residence in New Zealand and where the claimants have lodged written appeals with the Secretariat of the Authority within 15 working days of being notified of the decision of their claims.

7. The Authority shall not consider claims to refugee status where the claimants are appealing to the Authority on a second occasion, or on any occasion in respect of a case at any stage decided by the Interdepartmental Committee on Refugees.

Procedure

8. In determining claims to refugee status, the Authority shall consider each written decision of officers of the Refugee Status Section that is subject to appeal and any material submitted in writing by the claimant in support of the appeal and by the Refugee Status Section in support of its decision. The Authority shall interview the claimant and consider any evidence presented by the claimant unless the claim is prima facie manifestly unfounded or frivolous or vexatious, or manifestly well-founded. Where the authority interviews claimants (who may be accompanied by their representatives should they so wish), officers of the Refugee Status Section shall also be entitled to give evidence in person to the Authority. The Authority may question officers of the Refugee Status Section and, if necessary, other officers of government on the issues before the Authority, provided however that any information to be used by such officer before the Authority which may be prejudicial to the claimant's appeal shall be put to the claimant within a reasonable time before the interview for comment unless it is necessary to withhold that information for any of the reasons specified in section 6(a) to (d) of the Official Information Act 1982.

9. The Authority may, in relation to any appeal, request the Refugee Status Section to seek to obtain further information or to carry out further investigations and report to the Authority. If, in the opinion of the General Manager of the New Zealand Immigration Service in any such case, it is not practicable to obtain or to seek to obtain the information or to carry out the investigation, the Refugee Status Section shall report accordingly to the Authority.

10. The Authority shall give to each claimant at least 10 working days notice of the date on which the appeal is to be considered and of the date of any hearing involving the claimant.

11. The Refugee Status Section shall be responsible for the provision of an independent interpreter required at any hearing.

12. A decision of the Authority shall be a decision of the members hearing an appeal. Where members are unable to agree on a decision, the outcome shall be in favour of the claimant (that is, refugee status shall be granted). The decision of the Authority shall be either to grant or to decline refugee status. A decision of the Authority shall not be reconsidered by the Authority once conveyed to the appellant.

13. Subject to these Terms of Reference, the Authority may regulate its own procedure and receive such evidence and conduct any hearings in such manner as it thinks fit.

14. The Authority shall endeavour to make a decision on any appeal within a period of 8 weeks from the lodging of the appeal.

15. The decision of the Authority on every appeal, together with the reasons for it, shall be recorded in writing by the Secretariat and approved by the Authority. The Refugee Status Section shall provide a copy of the record to the claimant (or any representative of the claimant) and shall be responsible for informing the Minister of Immigration and the Minister of External Relations and Trade of the outcome of every appeal.

16. These terms of reference shall come into force on 1 April 1992, rescinding those under which the Authority previously operated except that where hearings have begun in respect of an appeal on or before that date the previous terms of reference shall continue to apply.

APPENDIX 3

*BENIPAL V MINISTERS OF FOREIGN AFFAIRS AND IMMIGRATION*¹:
SUMMARY OF FACTS AND FINDINGS

Mr Benipal arrived in New Zealand by plane on 15 May 1983, having passed through Pakistan, Iran, Austria, Belgium and Holland (where he purchased a Netherlands passport and altered it for his own use). Benipal travelled with a Mr Sangra. Both were Sikhs and members of the National Council of Khalistan. Mr Benipal had been imprisoned and tortured by government authorities in India because of his political activities. After being interviewed at the airport (where Chilwell J found Benipal asked for refugee status²), Mr Benipal and Mr Sangra were arrested for illegally entering New Zealand, and held in Mt Eden prison.

Representatives from the Ministry of Foreign Affairs and immigration officials interviewed Mr Benipal. They subsequently provided a report to ICOR, which recommended to the Ministers of Foreign Affairs and Immigration that the applications for refugee status of Benipal and Sangra be declined on the grounds that "neither applicant had pointed to a sufficiently high level of activity distinguishing them from thousands of other participants in the movement or warranting their being viewed as leaders of their movement"³.

The recommendation was accepted, and the immigration authorities began to make arrangements for Benipal to be removed from New Zealand. This proved to be a problem, since he did not have a valid passport. He remained in custody. Mr Sangra, who had an Indian passport, was removed and his fate is unknown.

Mr McLoughlin, a journalist, learned of Benipal's situation and made submissions on his behalf to the Minister of Foreign Affairs. The Ministry made inquiries of the West German government and an officer of the Ministry prepared a further, highly prejudicial, report. It stated that the Khalistan movement was "banned", and a "violent"

¹ (Unreported, 26 November 1985, High Court, Auckland Registry, Chilwell J, A 878/83, A 993/83, A 1016/83).

² Above 98.

³ Above, 5.

organisation⁴. McLoughlin and Amnesty International submitted further information, and eventually the Ministers agreed that ICOR should reconsider the matter at a second hearing at Mt Eden prison.

The Committee again concluded that Benipal did not have a well-founded fear of persecution and that only prominent leaders of the Sikh movement would be eligible for refugee status. The Ministers confirmed the declination of refugee status, and further arrangements for removal were made (initially without informing Benipal or his advisers). Benipal applied for a writ of habeas corpus and for interim relief and for the decisions of the Ministers and the ICOR to be quashed.

The respondent Ministers argued that the Court had "no jurisdiction to review the decision of the Minister respondents or the functions of the Interdepartmental Committee insofar as it is contended that such jurisdiction arises from the infringement of "rights" conferred on Mr Benipal by the Convention"⁵, relying on the (then) recent decision of the High Court of Australia in *Simsek v Minister for Immigration And Ethnic Affairs*. Simsek had applied for an interlocutory injunction to prevent his deportation pending the hearing of review proceedings, arguing that treaties conferring rights upon an individual could do so directly, while treaties imposing obligations upon an individual did not directly affect municipal law. Stephen J found that the Convention and Protocol did not impose obligations on the Minister nor did it confer rights on the applicant which were enforceable in the Courts.

Chilwell J distinguished Simsek on several grounds, including "the current more restricted approach to legitimate expectation in Australia"⁶. Counsel for Benipal pointed out that Mr Simsek's case was based directly on the Convention; he "took the 'high road' and based his case on international law"⁷. Mr Benipal, on the other hand, based his argument on New Zealand municipal law; that Benipal's application for refugee status was in reality an application for permission to stay in New Zealand and the issue

⁴ Above, 141.

⁵ Above 268.

⁶ Above 272; the judgment in Benipal was delivered on 26 November 1985. The judgment of the High Court of Australia in *Kioa v Minister of Immigration and Ethnic Affairs* (1985) 62 ALR 321 was delivered on 18 December 1985.

⁷ Above 269.

was the basis on which the Minister of Immigration exercised a statutory power of decision, namely his discretion whether to issue a permit⁸.

This line of argument avoided the necessity of trying to establish, as Mr Simsek had attempted to do, that the Refugee Convention had effect domestically. It also avoided the need to establish that the exercise of prerogative power was reviewable. At the time of the hearing, the decision of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service*⁹ clarifying this point had not been made, although it featured prominently in subsequent written submissions and in the Benipal judgment itself.

Chilwell J made two alternative findings. He found first¹⁰ that the Ministers of Foreign Affairs and Immigration were exercising statutory powers of decision:

[T]he decision of the Minister of Immigration was made on a preliminary issue [that is, his status as a refugee] the determination of which, favourably to Mr Benipal, would have required determination of his residence in New Zealand on a temporary or permanent basis. If the nations of the world placed no restrictions on the entry of people to their countries there would be no need for the Convention. It is precisely because nations do impose restrictions upon entry that something had to be done in regard to refugees. Restrictions on entry and the Convention are inseparable.

He also found that, even if the Ministers were exercising non-statutory powers in dealing with Mr Benipal's application for refugee status, their decisions were reviewable¹¹.

Chilwell J¹² found that the application was not properly dealt with by the Ministers. His Honour found that Mr Benipal had been treated unfairly *inter alia* in that immigration officials had failed to give him adequate guidance in filling out his application for refugee status or an adequate opportunity to give as much detail as he wished; the Ministry of Foreign Affairs representative discouraged him from obtaining legal assistance during the first interview; he was not supplied with a copy of the interview report, nor several subsequent reports and other prejudicial information made available

⁸ Above 243. In the course of arguing that the question at issue was the exercise of a statutory power of decision, it was submitted for Benipal that "for the purposes of domestic law, refugee applications are not dealt with under the prerogative": 246. This is not correct and Chilwell J did not so find.

⁹ [1985] AC 374 (HL); [1984] 3 All ER 935, hereafter *CCSU* cited to All ER. The *CCSU* decision was delivered on 22 November 1984. See Chilwell J's comments on the effect of the *CCSU* decision, above n 1, 262.

¹⁰ Above n 1, 247.

¹¹ Above 273.

¹² After 4 days of interlocutory hearings and 22 days of hearing on the substantive issues, in a 382-page decision.

to ICOR; and in that ICOR did not give him an opportunity to be heard before it made an adverse recommendation to the Ministers.

When the matter was reconsidered, the Committee "did not pay attention and listen to some of the evidence given by Mr Benipal and Mr McLoughlin", "had closed minds ... and did not take his application seriously"¹³. The "entire decision making process [was] unfair"¹⁴. Chilwell J found that the Ministers, in adopting the Committee's flawed recommendations, compounded the errors of law committed by ICOR¹⁵ and, in relation to the Minister of Immigration, found that there was a real likelihood or reasonable suspicion of bias¹⁶, in that the Minister had predetermined that he would reject the application after the re-hearing by the Committee.

He also found that the Ministers and ICOR misdirected themselves as to the criteria specified in the 1951 Convention. The Committee substituted its own opinion about whether the applicant had engaged in political activities, not whether the ruling government of the country of origin considered the activity to be political.

The applications to quash the decisions of the Ministers and of ICOR were granted. The Court also made a declaration¹⁷

binding on the Minister Respondents and the Interdepartmental Committee on Refugees that the Applicant is a person who owing to well-founded fear of being persecuted for reasons of religion and political opinion is outside the country of his nationality ... and, owing to such fear, is unwilling to avail himself of the protection of that country.

An appeal against the decision was lodged, but was unsuccessful. By the time the appeal was heard, Mr Benipal had been granted residence and the Court of Appeal held that the question of whether his application for refugee status had been properly dealt with was no longer a live issue¹⁸.

¹³ Above 372.

¹⁴ Above 375.

¹⁵ Above 232 and 375.

¹⁶ Above 319.

¹⁷ Above 380.

¹⁸ *Minister of Foreign Affairs v Benipal* [1988] 2 NZLR 222.

APPENDIX 4

SUMMARY OF CONSTITUTIONAL PRINCIPLES RELATING TO THE EXERCISE
NATURE AND REVIEWABILITY OF CROWN PREROGATIVE¹1 *Constitutional principles relating to the exercise of Crown prerogative*

The powers of the Crown must either be derived from Act of Parliament or recognised as a matter of common law. Prerogative is a matter of common law and does not derive from statute². "The right of the executive to do a lawful act affecting the rights of the citizen, whether adversely or beneficially, is founded on the giving to the executive of a power enabling it to do that act. The giving of such a power usually carries with it legal sanctions to enable that power if necessary to be enforced by the courts. In most cases that power is derived from statute though in some cases ... it may still be derived from the prerogative"³. Prerogative powers are exercised either by the sovereign⁴ or, according to constitutional practice, more often by those holding ministerial rank⁵.

The legal doctrine of the legislative supremacy of Parliament means that the extent of the use of the prerogative may be curtailed at any stage and in any manner by legislation⁶. Parliamentary legislation or the carrying out of statutory obligations may not be suspended by the exercise of prerogative power⁷. Statute prevails over prerogative. Where legislation deals with a subject which may also be dealt with under the prerogative, the Government must exercise the statutory powers, not

¹ This appendix is a brief summary of points which are relevant to the thesis put forward in the research paper. The writer found E C S Wade and A W Bradley, *Constitutional and Administrative Law* (10 ed, 1985) 245 (hereafter, Bradley) and *Halsbury's Laws of England* (4 ed) vol 8 Constitutional Law (hereafter, Halsbury vol 8) to be helpful and accessible authorities on crown prerogative.

² "The King hath no prerogative but what the law of the land allows him": *Case of Proclamations* (1611) 12 Co Rep 74.

³ *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); [1984] 3 All ER 935, hereafter *CCSU* cited to All ER 955 - 956, per Lord Roskill. For a brief history of the development of prerogative powers, see Bradley 245 - 247.

⁴ In New Zealand, the Governor-General as the sovereign's personal representative: *New Zealand Commentary on Halsbury's Laws of England* (1985) Binder C, Constitutional Law, para C 12 (hereafter, "New Zealand Commentary").

⁵ *CCSU* per Lord Diplock, 949 - 950.

⁶ Bradley, 247.

⁷ *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

the prerogative power⁸ although the two powers may co-exist⁹. A statute may expressly preserve the right to act under the prerogative¹⁰.

EXERCISE
The categories of the prerogative are closed and the exercise of prerogative power may not be extended into new areas¹¹:

[I]t is 350 years and a civil war too late for the Queen's courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints on citizens of the United Kingdom without any statutory authority are now well settled and incapable of extension.

To most lawyers, prerogative powers are all the non-statutory powers of the Crown which enable the government to function¹². Some commentators (notably Wade¹³) consider that the prerogative comprises a narrower class of powers than simply all of the Crown's non-statutory powers. Blackstone said¹⁴ that the term

can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects; for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer.

Those prerogative powers relating to "the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers"¹⁵ are "pure and strict"¹⁶ prerogative powers. The Crown's legal authority to carry out the executive and administrative functions of government may also be described as a prerogative power¹⁷. Some executive acts may be described simply as the Crown's exercise of common law rights and powers¹⁸.

Attorney-General v De Keyser's Royal Hotel [1920] AC 508.

CCSU per Lord Roskill at 956.

Halsbury vol 8 para 91 p 584. For a New Zealand example, see s 13 of the External Relations Act 1988 which provides: "Nothing in this Act extinguishes any power or authority that, if this Act had not been passed, would be exercisable by virtue of the prerogative of the Crown".

BBC v Johns [1965] Ch 32, per Diplock LJ, 79; Bradley, above n 254.

Bradley, 245.

H W R Wade *Administrative Law* (6 ed, 1988) 241 - 242 (hereafter, Wade).

Bl Comm 1.239, cited in Wade, above, 241. Dicey defined the prerogative in broader terms as "the remaining portion of the Crown's original authority, and is therefore, as already pointed out, the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Minister": *Introduction to the Study of the Law of the Constitution* (8 ed, 1915) 421, cited by Lord Fraser in CCSU, 941.

CCSU per Lord Roskill at 956.

Burt v Governor-General of New Zealand (Unreported, 16 July 1992, CA 175/88), 10.

Halsbury, vol 8 para 1152 p 711.

Above, para 931 p 599. See also Bradley, 247.

The same action of the Crown may be categorised by some commentators as being derived from prerogative powers, while others describe them as simply Crown exercise of common law rights. For example, Wade¹⁹ considers that the power to employ public servants is no more than anyone's common law power to employ servants while Bradley considers that "the legal relationship between the Crown and Crown servants ... differs markedly from the normal contractual relationship between employer and employee" this would therefore be a "pure and strict" prerogative power.

Lord Diplock considered that the argument whether prerogative powers include those powers peculiar to the Crown, or whether they include all non-statutory powers was of little practical legal relevance today²¹.

2 *Reviewability of the exercise of prerogative power*

At one time it was considered that the direct exercise of the powers of the prerogative was "irresistible and absolute"²² and therefore unreviewable²³ and that the remedy for abuse of the prerogative was a political and not a legal remedy²⁴. It has been recognised for some time that the decisions of tribunals and other officials whose authority derived from the exercise of Crown prerogative are reviewable²⁵. The traditional view that a direct exercise of the prerogative was not reviewable is no longer correct²⁶.

In *Benipal* Chilwell J found that the decisions of the Ministers of Foreign Affairs and Immigration were reviewable by way of the exercise of the prerogative remedies certiorari, mandamus and prohibition even if they were not exercising statutory powers of decision.²⁷ His Honour referred to the then recent decision of the majority of the

¹⁹ Above n 13, 392.

²⁰ Above n 1, 247.

²¹ *CCSU* 950.

²² Above 955.

²³ *Burt v Governor-General of New Zealand*, above n 16, 6.

²⁴ *CCSU*, per Lord Roskill at 955.

²⁵ *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864; [1967] 2 All ER 770; per Lord Parker CJ at 777, cited to All ER. For a New Zealand example of a tribunal set up under the prerogative see the decision of Barker J in *Silke Ali v Minister of Immigration* (unreported, 13 December 1991, High Court, Auckland, M 2270/91 in which he noted at 7 that the fact that the Refugee Status Appeal Authority "has solemnly been established by Government decree means that its existence cannot be ignored; not being a body exercising statutory power, its decisions could not be susceptible to judicial review but only to the prerogative writs".

²⁶ *Burt*, above n 16.

²⁷ (Unreported, 26 November 1985, High Court, Auckland Registry, Chilwell J, A 878/83, A 993/83, 1016/83) 273.

House of Lords in *CCSU* "that executive action is not necessarily immune from judicial review merely because it was carried out in pursuance of a power derived from a prerogative source"²⁸.

Other New Zealand courts had some difficulty applying *CCSU*²⁹ and the issue was not finally disposed of until the Court of Appeal decision in *Burt v Governor-General of New Zealand*³⁰. *Burt* is a decision about the prerogative of mercy, but the principles of this case are applicable to the exercise of the prerogative generally. Cooke P, delivering the judgment of the Court of Appeal, said³¹ that:

However, as to prerogative powers generally, it has become accepted in recent years that the mere fact that a decision has been made under the prerogative does not exempt it from review in the Courts. The test is rather whether the subject-matter of the decision is justiciable.

The finding that the source of power for any action is the prerogative does not preclude judicial review of that action, but the grounds for review may be narrower where a court is examining a use of the prerogative than where a statutory power is being reviewed³². In *CCSU*, Lord Diplock stated that illegality, irrationality and procedural impropriety could all be grounds for judicial review of decisions taken under prerogative or common law powers, although with respect to irrationality he found it³³

difficult to envisage in any of the various fields in which the prerogative remains the only source of the relevant decision-making power a decision of a kind that would be open to attack through the judicial process on this ground. Such decisions will generally involve the application of public policy" and "the judicial process is [not] adapted to provide the right answer" to such questions.

determining reviewability and the grounds for review, what is important therefore is not the source of the power under which a decision is made, but the subject-matter of the decision. Even a refusal to exercise the prerogative of mercy may be reviewable³⁴.

Above, 264. The Crown did not accept this finding and appealed, but the Court of Appeal in *Minister of Foreign Affairs v Benipal* [1988] 2 NZLR 222 refused to consider the issue. By the time the appeal was heard, Benipal had been granted a residence permit (and therefore had the right to remain in New Zealand indefinitely). The issue before the Court was therefore by that stage purely academic.

G D S Taylor *Judicial Review* (1991) para 1.08 p 7.

Above n 16.

Burt, above, 9.

Above n 16, 10. See also Bradley, 255.

CCSU, above n 3, 951.

Burt, above n 16, 15.

3 *The nature of prerogative powers*

Within the limited range of areas in which the Crown may exercise prerogative power the Crown may act in a manner which is legislative³⁵ or akin to legislation. An example of legislation authorised by the prerogative is described in *CCSU* where the Minister of the Civil Service altered the terms and conditions of work at GCHQ by acting pursuant to the Civil Service Order in Council 1982. This Order in Council had been issued by the sovereign by virtue of her prerogative on the advice of the government³⁶.

A proclamation or other document issued by the Crown under prerogative powers in which the force of law is claimed may be examined by the courts, who have the power to determine whether such documents have legal effect and are legally binding. "Prerogative legislation" is to this extent different to Acts of Parliament, which are supreme and not subject to judicial analysis in this way³⁸.

The Order in Council in *CCSU* was "primary legislation [which] derives its authority from the sovereign alone and not, as is more commonly the case with legislation, from the sovereign in Parliament"³⁹. The setting up of tribunals under the prerogative⁴⁰ is akin to legislation and the terms of reference of those bodies have a statute-like effect.

Some prerogative decisions are similar to judicial decisions⁴¹, while others are executive or administrative decisions. Other powers can only be described as unique to the Crown, such as the granting of honours or the conclusion of international treaties. While Parliament can only legislate, and cannot act judicially (except to enforce Parliamentary privilege) or administratively, the exercise of prerogative powers can be legislative, judicial, administrative or, simply, prerogative⁴².

³⁵ Bradley, 48.

³⁶ Per Lord Fraser, 941.

³⁷ *Case of Proclamations*, above n 2; see Bradley, 60.

³⁸ Bradley, 59.

³⁹ Per Lord Fraser, 942.

⁴⁰ For example, the Criminal Injuries Compensation Board set up "under the prerogative" to compensate victims of violent crime in *R v Criminal Injuries Compensation Board ex p Lain*, above n 25, and the Refugee Status Appeals Authority in New Zealand.

⁴¹ For example, the granting of the prerogative of mercy.

⁴² Halsbury, vol 8 para 814 p 537.

BIBLIOGRAPHY

- A Aleinikoff "The Refugee Convention at Forty: Reflections on the IJRL Colloquium" (1991) 3 IJRL 617.
- D Anker and C Blum "New Trends in Asylum Jurisprudence" (1989) 1 IJRL 67.
- I Brownlie *Principles of Public International Law* (4 ed, Clarendon Press, Oxford, 1990).
- P Cane "Prerogative Acts, Acts of State and Justiciability" (1980) 29 ICLQ 680.
- B S Chimni "Perspectives on Voluntary Repatriation: A Critical Note" (1991) 3 IJRL 541.
- Rt Hon Sir Robin Cooke "The Struggle for Simplicity in Administrative Law" in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s. Problems and Prospects* (Oxford University Press, Auckland, 1986).
- J Crawford and P Hyndman "Three Heresies in the Application of the Refugee Convention" (1989) 1 IJRL 159.
- A Dowty *Closed Borders. The Contemporary Assault on Freedom of Movement* (Yale University Press, 1987).
- J B Elkind and A Shaw "Municipal Enforcement of the Prohibition against Racial Discrimination" [1984] BYIL 190.
- J M Evans (ed) *de Smith's Judicial Review of Administrative Action* (4 ed, Stevens and Sons Limited, London, 1980).
- J Garvey "Toward a Reformulation of International Refugee Law" (1985) 26 Harv Int'l LJ 483.
- "The New Asylum Seekers: Addressing their Origin" in D A Martin (ed) *The New Asylum Seekers: Refugee Law in the 1980s* (Kluwer Academic Publishers, Dordrecht, the Netherlands, 1988).
- G S Goodwin-Gill *The Refugee in International Law* (Oxford, Clarendon Press, 1983).
- A Grahl-Madsen *The Status of Refugees in International Law Vols I & II* (A W Sijthoff, Leiden, the Netherlands, 1966, 1972).

A Grahl-Madsen *Territorial Asylum* (Almqvist & Wiksell International, Stockholm, 1980).

C Greenwood "The International Tin Council Litigation" *All ER Rev* 1989, 240.

D W Greig "The Protection of Refugees and Customary International Law" (1983) 8 *Austl Y B Int'l L* 108.

I Guest "The United Nations, the UNHCR, and Refugee Protection: A Non-Specialist Analysis" (1991) 3 *IJRL* 585.

I Gunning "Modernising Customary International Law: The Challenge of Human Rights" (1991) 26 *Va J Int'l L* 211.

Hailbronner, K "Non-Refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?" (1986) 26 *Va J Int'l L* 857.

Halsbury's Laws of England (4 ed, Butterworths, London, 1980).

J C Hathaway *The Law of Refugee Status* (Butterworths, Canada, 1991).

- "The Evolution of Refugee Status in International Law: 1920 - 1950" (1984) 33 *ICLQ* 348.

- "A Reconsideration of the Underlying Premise of Refugee Law" (1990) 31 *Harv Int'l L J* 129

- "Reconceiving Refugee Law as Human Rights Protection" (1991) Vol 4 No 2 *Journal of Refugee Studies* 113

A C Helton "The Detention of Refugees and Asylum-Seekers: A Misguided Threat to Refugee Protection" in G Loescher and L Monahan (eds) *Refugees and International Relations* (Oxford University Press, Oxford, 1989).

Hocke, Jean-Pierre. "Beyond Humanitarianism. The Need for Political Will to Resolve Today's Refugee Problem" in Loescher, Gil and Monahan, Laila (eds) *Refugees and International Relations* (Oxford University Press, Oxford, 1989).

P Hyndman "Refugees Under International Law With a Reference to the Concept of Asylum" (1986) 60 *A L J* 148

- "Australian Immigration Law and Procedures Pertaining to the Admission of Refugees" (1988) 33 *McGill LJ* 717.

Independent Commission on International Humanitarian Issues *Refugees: The Dynamics of Displacement* (Zed Books Ltd, London, 1986).

G Jaeger "Irregular Movements: The Concept and Possible Solutions" in D A Martin (ed) *The New Asylum Seekers: Refugee Law in the 1980s*.

Lawyers Committee for Human Rights *The Human Rights of Refugees and Displaced Persons: Protections afforded Refugees, Asylum Seekers and Displaced Persons under International Human Rights, Humanitarian and Refugee Law* (New York, 1991).

G Loescher and L Monahan (eds) *Refugees and International Relations* (Oxford University Press, Oxford, 1989).

D A Martin (ed) *The New Asylum Seekers: Refugee Law in the 1980s* (Kluwer Academic Publishers, Dordrecht, the Netherlands, 1988).

G Melander and P Nobel *Report No 4 of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law* (Lund, 1987).

V P Nanda (ed) *Refugee Law and Policy. International and US Responses* (Greenwood Press, Westport, Connecticut, USA, 1989)

New Zealand Commentary on Halsbury's Laws of England (4 ed, Butterworths, Wellington, 1985).

New Zealand Immigration Service *Manual of Immigration Instructions* (Department of Labour, Wellington).

Perluss and Hartman "Temporary Refuge: Emergence of a Customary Norm" (1986) 26 Va J Int'l L 551.

R Plender *International Migration Law* (2 ed, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1988).

R Plender and E Zoller *The Right of Asylum* (Hague Academy of International Law, Centre for Studies and Research in International Law and International Relations, 1989).

G Stenberg *Non-Expulsion and Non-Refoulement* (Uppsala University, Sweden, 1989).

M Taggart (ed) *Judicial Review of Administrative Action in the 1980s. Problems and Prospects* (Oxford University Press, Auckland, 1986).

G D S Taylor *Judicial Review* (Butterworths, Wellington, 1991).

B M Tsamenyi "The Position of Non-Parties to the Refugee Convention" [1981] Melanesian LJ 57.

United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria For Determining Refugee Status* (Geneva, 1988) HCR/IP/4/Eng Rev 1.

E C S Wade and A W Bradley *Constitutional and Administrative Law* (10 ed, Longman, New York, 1985).

H W R Wade *Administrative Law* (6 ed, Clarendon Press, Oxford, 1988).

A R Zolberg, A Suhrke and S Aguayo *Escape From Violence. Conflict and the Refugee Crisis in the Developing World* (Oxford University Press, New York, 1989).

VICTORIA
UNIVERSITY
OF
WELLINGTON

LIBRARY

A Fine According to Library
Regulations is charged on
Overdue Books.

- 1 APR 1994

HU	1146651
PLEASE RETURN BY	
16 JUN 1998	
TO W.U. INTERLOANS	

PU	5981
PLEASE RETURN BY	
18 AUG 1999	
TO W.U. INTERLOANS	

Checked in

DU	992358
PLEASE RETURN BY	
20 SEP 2002	
TO W.U. INTERLOANS	

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 00384149 9

~~Folder~~
Da

Davis, Wendy
The 1951 Refugee
Convention



Gesetzlich

VELO-BIND®

PATENTED