RIGHT OR WRONG – LET THE GAMES BEGIN?

SHOULD NEW ZEALAND ATHLETES COMPETE AGAINST COUNTRIES THAT ARE IN BREACH OF FUNDAMENTAL/NON - DEROGABLE HUMAN RIGHTS?

Alex Campbell*

Sport plays an important role in uniting a nation towards a common goal. It also assists in allowing nations to compete against each other, often exposing a part of each other's culture as a result. What happens when what is exposed clearly shows a nation's contempt for fundamental human rights? The notion that sport and politics should not mix has been espoused frequently. However, as information regarding the way different societies treat their citizens continues to flow, is it correct to allow our athletes to compete against countries which consistently breach fundamental human rights?

Introduction

New Zealand undoubtedly has a proud and successful sporting tradition. From success at the inaugural rugby world cup, to placing one of the first men on Mt Everest, New Zealand has viewed sport as an arena in which it can shine on an international stage. However, with success comes responsibility, limited not only to a particular sporting field or the domestic public, but also to the wider international community. A critical question is the extent to which a country should actively engage in sporting contact with nations that are in open breach of non-derogable/fundamental human rights? The answer is not a simple one.

This article will begin with a discussion surrounding the ever-increasing mix between politics and sport, and the speed in which these developments have occurred in the 20th century. It will go on to discuss New Zealand's acceptance of international law and the manner in which it is applied to the domestic legal system, discussing the concepts of both 'transformation' and 'incorporation'. The notion of non-derogable/fundamental human rights will then be discussed, with particular reference to their violation through apartheid, torture and the unlawful use of force. To determine New Zealand's approach, it is necessary

* Alex Campbell, BA LLB (Canterbury)

to inspect a number of instances where breaches of fundamental rights have occurred and examine the sporting relevance surrounding New Zealand's involvement.

Particular assessment will be made of sporting contact with South Africa and consideration will be given to the different stances that New Zealand has taken, ranging from national acceptance to full-scale rioting and heavy political involvement. Analysis will also be drawn from examples that are more contemporary, such as cricketing contact with a Mugabe-led Zimbabwe and the recent Olympic games in China. In reviewing such examples, it will be established that New Zealand has a number of options for determining its position and obligations. These include full governmental control over all sporting bodies, whereby the government uses statutory power to limit and/or stop all contact with countries that are in breach of fundamental human rights. There is also the notion that all New Zealand sports could fall under a self-regulated body that must comply with a stringent code of ethics, in which case the decision whether to compete would rest solely with the sporting community. However, policy reasons seem to dictate that the government must at least have some degree of control surrounding sporting contact.

Sport and Politics

The sentiment that sport and politics should not mix clearly has merit, especially where amateur sport is involved.[1] This was certainly the view of passionate New Zealand rugby fans prior to the arrival of the South African Springboks in 1981. However, as sport is increasingly being used as a form of political diplomacy, it is clear that in certain instances the two cannot be divorced. Even as far back as 1521, diplomatic negotiations were considerably set back when King Henry VIII lost a wrestling match against his French counterpart.[2] However, the 20th century has seen an upsurge in the ways in which politics has firmly entered the sporting arena.

The Olympic Games are a pertinent example of such intertwinement. The 1936 Berlin Olympics witnessed the use by the Nazi regime of the event in an attempt to promote the eugenic theories, which underlaid its political purges.[3] There were moves from certain nations such as the United States, France and the United Kingdom to boycott the Games, and while there was public support for the idea, the notion that sport and politics should remain separate prevailed.[4] Hitler's attempt to showcase the supposed superiority of his Aryan athletes failed, and his

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1 Deborah Healey, *Sport and the Law* (UNSW Press, 4th ed, 2009) 27.

2 British Council of Romania, *Kings and Countries – The Historical Tradition of Political Involvement in Sport* (2003) <http://elt.britcoun.org.pl/elt/s_polit.htm>.

3 United States Holocaust Memorial Museum, *Nazi Olympics, Berlin 1936* <http://www.ushmm.org/wlc/article.php?ModuleId=10005680>.

4 British Council of Romania, above n 2.

refusal to present the black American athlete, Jesse Owens, with his gold medals only confirmed the considerable political control the Nazis were attempting to exert. There are numerous other examples of the Olympics becoming a political staging point for non-state actors as well as nations. The Munich Games of 1972 is best remembered, not for its sporting achievements, but for the attack by the Black September terrorist organisation that killed nine Israeli athletes.[5] In a retaliation boycott, the 1980 Moscow Games and the 1984 Los Angeles Games were considerably disrupted by political manoeuvring. The apartheid situation in South Africa and the subsequent rugby tour by New Zealand also saw a boycott of the 1976 Montreal Olympics by several Commonwealth countries. These instances are only a small example of the intricate mix between sport and politics, and are not confined to the Olympic Games.

However, there is now an increasing international awareness of the role sport can play on the political landscape. With the advent of the United Nations and the continuing recognition of human rights, there is growing consensus that international sporting encounters have greater ramifications than just the score line. As the world continues to become more globalised, there is greater pressure for nations to adhere to international norms, especially those associated with human rights, and to decide what course of action should be taken when these breaches occur. How New Zealand applies these international norms will be discussed in the ensuing section.

Incorporation v Transformation

In order to ascertain the relevance of international law in relation to a domestic setting, its implementation must be considered. Customary international law is one source that forms New Zealand's unwritten constitution, and therefore has definite relevance in the country's constitutional development. There are two significant doctrines relevant to the integration of international law in the domestic sphere. Lord Denning MR coined the names for both doctrines in the English Court of Appeal decision of *Trendex Trading Corporation v Central Bank of Nigeria*,[6] these being 'incorporation' and 'transformation'.

Transformation is based upon the perception that two quite discrete systems of law operate. It maintains that before any rule or principle of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically 'transformed' into municipal law by the use of the appropriate constitutional machinery, such as an Act of Parliament.[7] Prior to the decision in *Trendex*, the English courts appeared to favour this approach.[8] This doctrine grew

5 Ibid.
6 [1977] QB 529 ('*Trendex*').
7 Malcolm N Shaw, *International Law* (Cambridge University Press, 4th ed, 2003) 129.
8 *R v Keyn* (1876) 2 Ex D 63.

from the procedure whereby international agreements are rendered operative in municipal law through ratification by the particular state concerned. From this, the idea has developed that any rule of international law must be transformed, or specifically adopted, to be valid within the internal order.[9] A leading example of where this doctrine is wholly accepted is in the United States.

The position in New Zealand, however, is somewhat different. Here the courts have decided to follow the *Trendex* decision and uphold the doctrine of incorporation.[10] Incorporation holds that international law is part of the municipal law automatically without the necessity for the interposition of a constitutional ratification procedure.[11] The New Zealand Court of Appeal held in *Governor of Pitcairn and Associated Islands v Sutton*[12] that broadly couched statutes will not displace principles of customary international law incorporated into the common law of New Zealand. This doctrine refers to customary international law, and different rules apply to treaties, where the orthodox view required that these be specifically adopted by Parliament. However, as Phillip Joseph argues, 'the separation between the international legal order and national legal systems has withered under the influences of globalisation and international human rights instruments'.[13] Customary international law is therefore automatically adopted into the common law of New Zealand, ensuring its relevance within our domestic jurisdiction.

Fundamental/ Non-derogable Human Rights

As a response to the atrocities which occurred during World War II, the formation of the United Nations and that organisation's adoption of the *Universal Declaration of Human Rights*[14] laid the foundation for the modern international conception of human rights. The Preamble to the *UDHR* entreats member nations to promote a number of human, civil, economic and social rights, and proclaims that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation

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9 Shaw, above n 7, 129.
10 Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (Thomson Reuters, 2nd ed, 2001) 27.
11 Shaw, above n 7, 129.
12 [1995] 1 NZLR 426.
13 Joseph, above n 10, 28.
14 GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/Res/217A (10 December 1948) ('*UDHR*').

of freedom, justice and peace in the world'. This seminal document is now supported by seven core treaties designed to protect and promote human rights in the international community.[15]

Perusal of international human rights literature clearly reveals the contentious nature of establishing a hierarchy of human rights.[16] There is definite validity of critiques of such a hierarchy, as it can be argued that human rights are of an interdependent character and that one's suspension may affect others.[17] However, some human rights instruments have dedicated more protection to certain specific rights, and have established that no derogation from them is possible even when war or national emergency imperils the life of the state. As one commentator notes, 'non-derogable human rights have often been recognised as the residuum remaining after states have declared their need to derogate from human rights norms'.[18] Three of the most important human rights conventions (the *ICCPR*, *European Convention on Human Rights*[19] and *American Convention on Human Rights*[20]) contain four common non-derogable rights: the right to life; the right to be free from slavery and servitude; the right to be free from torture or inhumane treatment or punishment; and the right to be free from retroactive application of penal laws.

The specificity and status of non-derogable rights has led academic commentators to describe them by employing such phrases as 'core rights', 'fundamental rights' or the 'most basic human rights'.[21] It is often argued that non-derogable human rights, or at least those four just mentioned, have a *jus cogens* character. Indeed, the theoretical confusion surrounding *jus cogens*, which is perhaps best understood as a body of higher law characterised by its recognition and acceptance by the international community, make it somewhat difficult to differentiate it from the category of non-derogable rights.[22] Therefore, despite

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[15] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 2 May 1991, 30 ILM 1517 (1991) (entered into force 1 July 2003).

[16] Koji Teraya, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights' (2001) 12 *European Journal of International Law* 917, 918.

[17] Cecilia Medina Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System* (Martinus Nijhoff Publishers, 1988) 13.

[18] Teraya, above n 16, 923.

[19] Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

[20] Opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

[21] Quiroga, above n 17, 13.

[22] Teraya, above n 16, 927.

the debate over the notion of the indivisibility of human rights, it is still possible to discern a core set of rights, the gross and systematic violation of which will engender international condemnation. As Professor Buergenthal suggests:

> In my opinion an international consensus on core rights is to be found in the concept of 'gross violations of human rights' and in the roster of rights subsumed under it. That is to say, agreement today exists that genocide, apartheid, torture, mass killings and massive arbitrary deprivations of liberty are gross violations.[23]

Similarly, in New Zealand, recognition of the sacrosanct nature of such fundamental rights was boldly articulated by the late Sir Robin Cooke, in the *Taylor v New Zealand Poultry Board*[24] decision where the learned Judge stated: 'I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them'.[25] This statement sends a clear message that domestic courts will not lightly find or indeed find at all the extinguishment of a fundamental right by legislation.[26] While this is an encouraging position, the unvarnished reality is that a plethora of regimes exist that routinely breach human rights. As a result, there is arguably a responsibility for the international community to act. Therefore, with regard to sporting contact, New Zealand must carefully decide on a course of action consistent with its international obligations.

A Country Divided

In order to establish what the appropriate response should be regarding New Zealand's control over its athletes, it is helpful to examine what measures have already been attempted, and to establish whether they were effective and just.

The continued sporting contact with South Africa during the apartheid regime provides a useful aid in establishing such measures. So dramatic were the events that surrounded the 1981 rugby tour by South Africa to New Zealand, that some commentators describe this event as 'the moment when New Zealand lost its innocence as a country'.[27] Whether or not this is accepted, it was undoubtedly a time of considerable unrest, and a period when sport and politics came into direct conflict.

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[23] Thomas Buergenthal, 'Codification and Implementation of International Human Rights' in Alice H Henkin (ed), *Human Dignity: The Internationalization of Human Rights* (Kluwer Law, 1979) 15, 17.

[24] [1984] 1 NZLR 394.

[25] Ibid 398.

[26] Morag McDowell and Duncan Webb, *The New Zealand Legal System: Structures, Processes and Legal Theory* (Butterworths, 2nd ed, 1998) 344.

[27] Ministry for Culture and Heritage, *The 1981 Springbok Rugby Tour* (23 October 2010) New Zealand History Online <http://www.nzhistory.net.nz/culture/1981-springbok-tour>.

In 1948, the white minority in South Africa had extended their privileged status when the Nationalist Party came to power. With it came the policy of apartheid, which strictly divided the races and extended the gap between the wealthy white population and the considerably less fortunate coloured and black populations.[28] This division was implemented in all facets of South African life, including on the sports field. Apartheid, which literally means separateness, was an intense form of racial discrimination. In the case of the South African regime it was accompanied by additional and gross human rights violations such as torture, unlawful execution and arbitrary detention, which attracted worldwide condemnation.

In a sporting context, New Zealand, historically, merely assented to the wishes of South Africa. This was especially the case in regard to rugby union, a sport that arguably played a significant role in the identity and culture of both nations. Not only was there continued contact, but furthermore, the New Zealand Rugby Football Union ('NZRFU') did not select Maori players to tour the republic until 1970.[29] This decision not to include Maori players was made independent of government control. The NZRFU, therefore, had adopted its own political policies in order to continue touring and playing in South Africa. While it may be argued the decision was made in the interests of rugby, there appears to be a paradox. While rugby was certainly played for enjoyment, it was also played to be won, and there was no greater rugby foe than South Africa. The success of a sport invariably promotes national interest and in this regard the New Zealand 'All Blacks' were certainly successful. However, in the tour of 1928, arguably the star player of the team, a Maori named George Nepia, was omitted from the squad to conform to South Africa's overtly racist policies.

As public disquiet grew over time, there was greater government involvement regarding sporting contact with South Africa. While the public began putting pressure on the rugby union, so too did the politicians. During the 1960s Prime Minister Keith Holyoake stated that 'in this country we are one people'.[30] This was a direct response to excluding Maori players from going to South Africa, and subsequently a proposed tour in 1967 was cancelled.

Finally, in 1970, a multiracial team was sent to the republic. This had ramifications for both countries. Although the South African regime's position on race had not softened, the thirst for international sporting competition had only intensified. The South African government had allowed Maori to travel as 'honorary whites'.[31] This, however, was too much for some South African Nationalist

[28] Ministry for Culture and Heritage, *Politics and Sport – 1981 Springbok Tour* (24 February 2009) New Zealand History Online <http://www.nzhistory.net.nz/culture/1981-springbok-tour/politics-and-sport>.
[29] Ministry for Culture and Heritage, above n 27.
[30] Ibid.
[31] Ibid.

Party members, who left the party as a direct result.[32] This 'concession' had also enraged many in New Zealand who understandably felt that this gesture only undermined the notion of racial equality.

It was not until 1973, however, that a New Zealand government made a complete stand against apartheid. That year the Labour Prime Minister, Norman Kirk, had directly asked the NZRFU to withdraw an invitation to a touring South African rugby team.[33] After the NZRFU refused the request, the Prime Minister, fearing the country would be gripped by violent protests, announced his government would cancel the tour.[34] The question to be considered here is whether the action taken by the Labour government was excessive, given that New Zealand prides itself on being a free and democratic nation? This was, and always will be, an option for New Zealand governments when faced with such issues. Breaches of human rights, such as apartheid, have wide implications on a domestic and international front, and accordingly require some form of government involvement. However, is the outright ban of such events a desirable course of action? Eight years following this ban, the new Prime Minister, Robert Muldoon, disagreed with such a notion.

The New Zealand National government was committed to keeping sport and politics in separate spheres. Despite New Zealand being a signatory to the Gleneagles Agreement, the Prime Minister, Robert Muldoon, had stated there would be no political interference in sport in any form.[35] The Gleneagles Agreement arose out of a Commonwealth Heads of State meeting in 1977, where there was a unanimous promise by states to 'discourage' all sporting contact with South Africa.[36] While there is evidence to suggest that many in the New Zealand National Party expressed concern over the tour, inevitably the decision was left up to the NZRFU, which was more than happy to host the South Africans despite widespread condemnation. Because of national political jostling, successive New Zealand governments had adopted dramatically different stances towards the issue of sporting contact with South Africa in a very short space of time, and in the process, tarnished the country's international reputation.

However, the saga of New Zealand and apartheid was still far from over. In 1985, a new twist emerged. In this year, New Zealand signed and ratified the

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[32] John Nauright, *Sport, Cultures and Identities in South Africa* (Leicester University Press, 1997) 95.

[33] Isobelle Gidley and Richard Shears, *Storm out of Africa: The 1981 Springbok Tour of New Zealand* (Macmillan, 1981) 75.

[34] Ministry for Culture and Heritage, *Stopping the 1973 Tour – 1981 Springbok Tour* (24 February 2009) New Zealand History Online <http://www.nzhistory.net.nz/culture/1981-springbok-tour/1973-springbok-tour>.

[35] Ministry for Culture and Heritage, *Gleneagles Agreement – 1981 Springbok Tour* (24 February 2009) New Zealand History Online <http://www.nzhistory.net.nz/culture/1981-springbok-tour/gleneagles-agreement>.

[36] Ibid.

International Convention against Apartheid in Sports.[37] As opposed to the Gleneagles agreement, this piece of international legislation was considerably more forceful in its intent. Articles 6, 7 and 8 of the *Convention*, in particular, outline the punishments and ramifications that will result for both the sporting community and the state signatories, should there be a breach.[38]

New Zealand had taken a clear step in recognising its international obligations, and through the process of 'incorporation', the treaty would have considerable force in domestic law. What began was a period of uncertainty and back room bargaining for New Zealand rugby. The NZRFU had, in essence, been banned from further sporting contact with South Africa. As a result, a tour that had been planned for 1985 was cancelled. However, such was the interest in New Zealand and South African competition that individual players began a series of private meetings to discuss the possibility of an unofficial tour. This followed from a court injunction that held that a touring side representing New Zealand would not be in the best interests of New Zealand rugby and therefore went against their self-imposed mandate.[39] While it was clear that there was no legal or political support for a representative side to tour, there was nothing that prohibited individuals from travelling to South Africa.

This rebel or 'Cavalier' tour as it came to be known proved to be unsuccessful. Not only did the team lose, but the rugby faithful that had supported the team through the anguish of the 1981 fiasco lost a degree of interest. This is mainly attributed to the fact that these amateur players received considerable cash incentives to play, and were therefore viewed with some degree of contempt.[40] The NZRFU had made it clear that there would be repercussions for those that went on tour. However, the reality was the players received a mere two test ban, and more than half the players that were in the team that won the 1987 Rugby World Cup were part of the Cavalier tour. This rather weak punishment by the NZRFU outraged the Labour Prime Minister, David Lange. Lange had nothing to do with rugby for two years and refused to hold any official functions for the 1987 World Cup that New Zealand was hosting.[41]

Contemporary Concerns

The South African situation provides various examples of the domestic constraints available when a government faces sporting competition with a nation that is in breach of fundamental human rights. While South Africa has now been accepted back into the international fold, following the fall of apartheid, it still provides excellent illustrations. In considering an approach where neither a government

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[37] Opened for signature 10 December 1985, 974 UNTS 178 (entered into force 3 April 1988).
[38] Ibid.
[39] David Kirk, *Black and Blue* (Hodder Moa Beckett, 1997) 76.
[40] Ibid 85.
[41] Ibid 93.

body nor a sporting body should restrict its athletes, invariably the question arises surrounding the degree of the breach. For example, in a situation such as South Africa, where racial discrimination through apartheid was nationally enforced, there is a strong argument that taking no action would be morally repugnant. However, would the same be said of sporting contact with the United States?

As discussed, the right to freedom from torture and inhumane and degrading treatment is a recognised non-derogable human right. Yet what constitutes torture can at times be questionable. The *US State Department's 2003 Country Reports on Human Rights Practises* contained a list of examples of torture which it accused numerous countries of practising.[42] In the examples given, the US itself was guilty of torture in regards to the treatment of detainees at its military base in Guantanamo Bay.[43] Concerning these events, should New Zealand therefore attempt to constrain its athletes from competing against the United States or should it limit its response to only gross breaches of fundamental human rights? In a world where things are often said but unfortunately not always done, states need to be careful when condemning others for human rights abuses.

The answer to when, and at what point, a nation should intervene to restrain its athletes, may depend on the repercussions faced by the nation. If New Zealand were to ban all sporting competition with the US, the political ramifications would be considerable. Nationally, New Zealand and the US rarely compete against one another, so the impact on sport would be minimal. However, the fallout over the Australia, New Zealand, United States Treaty ('ANZUS')[44] provides a clear indication that the US will move against nations that take a stand over practices they deem unacceptable. It may be suggested, that New Zealand is guilty of hypocrisy. Should New Zealand therefore keep politics and sport separate and avoid potential incidents? The reality however, is that sport is no longer peripheral as it is 'intertwined with human and national identity'[45] and thus is becoming increasingly used as a tool of diplomacy. If accepted that governments have an obligation to intervene in sporting contact, it is important to ascertain what level of involvement is appropriate. To gauge such a response, attention will now turn to the situation in Zimbabwe and the 2005 proposal for a New Zealand cricket tour.

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[42] Human Rights Watch, *Examples of Torture or Other Cruel, Inhuman, or Degrading Treatment Condemned in the US State Department's 2003 Country Reports on Human Rights Practices (Special Focus Page)* <http://www.hrw.org/campaigns/torture/methods/stress_duress.htm>.

[43] Christchurch Press (28/03/2008)

[44] As a result of the New Zealand government's refusal to allow the USS Buchannan to dock in New Zealand Harbours, New Zealand was expelled from the military alliance it had with Australia and the United States.

[45] Brian Brooks and Jean Struweg, 'Sports Law Regulation: Is There a Place for Ethics in the Regulation of Sports?' in Elizabeth Toomey (ed), *Keeping the Score: Essays in Law and Sport* (Centre for Commercial and Corporate Law, 2005) 10.

There was considerable public opposition to the 2005 cricket tour of Zimbabwe by New Zealand. This was due to the overt abuse of human rights in that country through the use of force and aggression, most notably through the government mass evictions campaign known as Operation Murambatsvina, meaning 'drive out rubbish'. The official reason for the policy was to reduce illegal housing and to stop the spread of infectious disease. However, the policy's consequence has been that hundreds of thousands of poor people have literally been made homeless, as bulldozers simply demolished housing in retaliation to people in these areas voting against the Mugabe government in the 2005 elections. There has been widespread international condemnation of these actions and New Zealand has played a part. The proposed cricket tour to Zimbabwe left New Zealand Cricket ('NZC') and the government in an unenviable position. Recent changes by the International Cricket Council ('ICC') meant that cricket tours could only be cancelled, without penalty, if the sporting body believed the player's lives were in danger or if legislation prevented them from touring.[46] If NZC were to cancel the tour it would have been in breach of contract, resulting in million dollar fines and significantly reducing the chance of hosting the 2011 Cricket World Cup.

Should the New Zealand government, in light of these circumstances, have legislated against the tour, or should it have simply stayed out of proceedings altogether? The position of NZC was difficult. If it went ahead with the tour it could have been seen as condoning the Zimbabwean government's actions, but if it cancelled the tour, the consequences 'would be disastrous to all levels of the game of cricket in New Zealand'.[47] The government had to balance the freedoms and rights of its own citizens with those of the ill-fated Zimbabweans. Short of instructing NZC to call off the tour, the government nevertheless proposed a parliamentary resolution to call on the ICC and NZC to cancel it. This was carried by an overwhelming majority of 110-10 votes.[48] Not only did the resolution pass, the government went further by stating it would deny entry visas to Zimbabwean cricketers should they attempt to tour later in the year.[49] While the resolution was not legally binding, it sent a clear message to the cricketing and international community that the tour was not condoned by the government, and a strong indication to the Mugabe regime that its actions were unacceptable.

The reaction by the government was arguably correct. Diplomatically, it presented a clear objection to the tour, while stopping short of restricting the right of free travel enjoyed by the New Zealand public. As Foreign Minister Phil Goff indicated, the government did not want to copy Robert Mugabe by denying

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[46] DPA, 'Government Won't Stop NZ Cricket Tour of Zimbabwe', *Monsters and Critics*, 16 July 2005 <http://sport.monstersandcritics.com/othersport/printer_1034599.php>.

[47] As per Martin Snedden, NZC chief executive: 'Kiwis Ignore Tour Pull-Out Motion', *BBC Sport*, 26 July 2005 <http://news.bbc.co.uk/sport2/hi/cricket/4713507.stm>.

[48] http://www.sportsbusiness.com/news/158063/new-zealand-to-go-ahead

[49] DPA, above n 46.

the right of New Zealanders to travel overseas.[50] There is, however, an argument that the government went too far in denying visas to Zimbabwean players. It is in essence a similar idea to that put forward surrounding the Springbok tours. As sport is undeniably an important aspect of New Zealand's culture, should government intervention deny the sport-loving public the chance to enjoy competition?

If the issues in Zimbabwe are of such great concern to the government, then perhaps an even stronger position should have been taken to stop New Zealand cricketers from travelling to Zimbabwe. By denying the right of the public to choose whether they will watch a touring Zimbabwean side, the government may be seen to be impinging on the individual consciences of its citizens. There appears to be no perfect answer as to the appropriate level of government involvement in such matters. There is, however, perhaps a cynical argument to be made, that had Zimbabwe been a significant trading partner of New Zealand, the government may have been less inclined to take such a strong stance. This notion has also been suggested concerning the 2008 Olympic Games in China.

As the world turned its attention to the 2008 Olympic Games in China, the focus appeared to be more on human rights issues rather than sporting ones. There is overwhelming evidence to support claims that China has an abysmal human rights record, and is definitely in breach of non-derogable human rights, especially in the practice of torture and the denial of the right to freedom of thought, conscience and religion.[51] The human rights watchdog, Amnesty International, is particularly scathing of China's state use of torture. Torture is officially sanctioned in China, with many officials specifically excluded from prosecution for crimes of torture.[52] Therefore, on the basis of this clear breach, should New Zealand have boycotted these Olympics Games, or simply left the decision up to the New Zealand Olympic Committee ('NZOC')? Once again, the level of governmental control over the sporting community is at issue. Prior to the Beijing Olympics, New Zealand had recently signed a free trade agreement with China, the first developed country to do so. Therefore, it would seem inconsistent for the government to consider restricting athletes from travelling to China. Unlike the stance taken against Zimbabwe, there has been little public condemnation by the government in regards to human rights violations.

Perhaps the answer lies in developing a binding code of ethics to which all sports must adhere. Given the ever-increasing professionalism within sports, parallels can be drawn from other disciplines that have established ethical codes. Both the legal and medical professions are bound by such codes and heavy penalties

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[50] Ibid.

[51] Amnesty International, *China: Torture in China – A Growing Scourge in China: Time for Action* (12 February 2001) <http://www.amnesty.org/en/library/asset/ASA17/004/2001/en/dom-ASA170042001en.html>.

[52] Ibid.

exist for those in breach. Could a code of ethics be applied to all sports in New Zealand to ensure that competition is played only with those countries that adhere to fundamental human rights norms? There is potential that such a code could develop but as Brooks and Struweg argue, 'to be effective it must operate in conjunction with other measures to improve the conduct in sport'.[53] This may mean that a code works in tandem with legislation, which could entrench certain provisions. It would also be necessary to have the support from the whole New Zealand sporting community. This would ensure consistency and provide substantial support for smaller sporting bodies.

An encompassing national sports body would be able to exert pressures over those athletes who defied an ethical code, possibly resulting in expulsion from the sport. However, while such a national sporting body may be beneficial, there is also the possibility that representatives of larger, more popular sports would take a greater control and thus have more input and direction over an ethical code. This could lead to frustration and a prospect of breakaway sporting factions. Therefore, perhaps the status quo should remain, where the governing body of each national sport controls the standard of behaviour of its athletes.

This is especially relevant where there are considerable behavioural differences expected of athletes, especially of those that generate considerable public attention. With regard to New Zealand's Olympic athletes, such a code exists, although it is formulated in a contractual framework. It is based largely around the Olympic Charter, although in New Zealand, a recommendation in 1986 saw athletes given the chance to contribute to the decision-making process.[54] This particular code was the subject of debate, given the potential for trouble surrounding the China Games. It has been suggested that New Zealand athletes were more restricted in what they could say during the Games, more so than what was required by the Olympic Charter, and indeed more so than in other Western countries, such as the US and Australia.[55] Although the relevant clause had been contained in the New Zealand Olympic Athlete agreement prior to the 2008 games, the New Zealand government may have been relieved that its existence effectively curtailed any statements from its athletes on human rights issues which could have proved potentially damaging, given the approaching trade agreement with China.

Then Sports Minister, Clayton Cosgrove, while acknowledging the independence of the NZOC, said in Parliament that he had intervened to express concern over the restrictive nature of the contracts. This came shortly after an indication by the Minister that the contracts were not part of the government's business.[56] While

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[53] Brooks and Struweg, above n 42, 10.

[54] The Press, 'NZ Officials Agree to Lift Gag on Athletes', *Stuff.co.nz* (19 February 2008) <http://www.stuff.co.nz/print/4407547a1823.html>.

[55] Ibid.

[56] Ibid.

it could be argued that Cosgrove's actions were simply political point scoring, another interpretation is that this was a situation where a code of conduct or ethics had been established, but where perhaps due to public pressure the Government felt the need to step in. The NZOC said it would remove the restrictive clause if the Athletes Commission desired it. The Government's intervention seems appropriate given the fact that Athletes Commission member Stephen Patterson said that politics should not be part of the Olympic Games.[57] While the statement may have had good intentions, as discussed earlier, international sport and politics now go hand in hand.

Conclusion

There is little doubt that international sporting events attract enormous public interest, and engender national pride, unity and even euphoria among the populations of the participant nations. New Zealand has had a long and successful sporting history, which will likely continue, as sport has become deeply embedded in the national culture. Sport can provide an ideal vehicle for individuals to take pride in the participation and the success of their nation, and, like war, it has a powerful ability to unite people of disparate backgrounds behind a common banner. It is necessary therefore, that when the country does compete, that support is united. In relation to our competitors, it is paramount that a level of fair play is adhered to and that the game is played in the correct spirit. One may argue that to accomplish this, opponents must also meet the same standards. It is becoming more and more apparent that these standards are not just restricted to the playing arena. With increasing access to information, and the continuing support for global human rights, the international community is considerably more vocal when countries appear to breach fundamental rights.

Therefore, should New Zealand allow its athletes to compete against those countries that are in clear breach of fundamental human rights norms and in doing so, damage the country's reputation and more importantly condone the actions of another state? As noted throughout this paper, the answer to this question remains a difficult proposition. New Zealand has a responsibility to conform to international law and to ensure that when such laws are broken, appropriate action is taken. By allowing its athletes to compete against countries in breach of such norms, New Zealand fails to comply with its international responsibilities. An ethical code may have some validity, but considering the international ramifications that may result from not competing, it is argued here that governmental action is necessary.

Given the important status of fundamental/non-derogable human rights, breaches of these principles are of serious concern. As illustrated in the preceding examples, countries that have flouted such laws have attracted widespread

[57] Ibid.

public condemnation. While the action taken by the New Zealand government has in some instances been strong, more could be done. While it is accepted that at certain times states must walk a diplomatic tightrope, breaches of such fundamental principles should not be ignored. Because of the close relationship sport and politics now have, the New Zealand government should take all reasonable steps to ensure that its athletes do not compete in or against countries that are in breach of fundamental human rights norms. Whether it is reasonable to deny athletes visas to leave the country may be a matter of degree, but certainly support, both financial and moral, should be withdrawn from athletes competing against those in breach. Historically, New Zealand has battled hard to fight injustices in the international community, and a strong approach to the issue is therefore justified.