

Non-Refoulement on the basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law

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It is now well established that international human rights treaties impose obligations on states to protect persons from refoulement beyond the terms of the Refugee Convention. However, there remains much disagreement concerning the scope of protection to be provided. One of the most contentious issues is whether protection is restricted only to persons who fear torture and/or a violation of the right to life (narrowly understood), or whether it can also include persons whose claims rely on a deprivation of socio-economic rights on return to their country of origin — that is, whether return to deprivation in the form of famine, or lack of medical treatment, or education, can invoke a state's international protection obligations. The notion that the obligation to protect from refoulement may include socio-economic rights violations has been thought to present such a threat

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to state sovereignty that the right to seek such protection, at least in the context of medical treatment, has been explicitly excluded from some existing and proposed domestic schemes, most recently in the proposed system of complementary protection to be introduced in New Zealand. This article uses the exclusion on socio-economic grounds proposed in the Immigration Bill 2007 as a method of testing the scope of complementary protection at international law. Drawing extensively on international, regional, and domestic jurisprudence, this article argues that socio-economic rights are clearly implicated and must therefore be considered by states in expulsion decisions, and that, accordingly, blanket exclusions are inconsistent with international law. The article concludes by calling for reasoned and principled judicial and legislative decision-making in this area in preference to the unsustainable policy concerns that are at risk of dominating discourse in this field.

Introduction

The concept that states have a responsibility to protect the human rights of non-citizens, including those residing outside their own territory, is very much in vogue.¹ Although the concept is most often invoked in the context of debates about the obligation of states to undertake humanitarian intervention — that is, to protect civilians from mass atrocities and crimes against humanity occurring in another state — it has been seized upon by other United Nations actors in other contexts, including recently by the Office of the United Nations High Commissioner for Refugees (“the UNHCR”). In 2006 the UNHCR chose the concept of the “responsibility to protect” as the theme for its *Note on International Protection*, submitted to its Executive Committee in its 57th session. In that document, the UNHCR alludes to the call by the United Nations Secretary-General for the international community to embrace the “responsibility to protect” and notes that this serves as a reminder that the responsibility to protect is “first and foremost an individual state responsibility and that where the state fails, there is a

1 In 2005 the then United Nations Secretary-General Kofi Annan urged the world to “embrace the responsibility to protect, and when necessary ... act on it”; see Annan, “In larger freedom: towards development, security, and human rights for all” (A/59/2005), para 135. See generally Feller, “The Responsibility to Protect: Closing the Gaps in the International Protection Regime”, in McAdam (ed), *Forced Migration, Human Rights and Security* (2008) 283.

collective responsibility to act”.² While the UNHCR was not suggesting that states have an obligation, under the auspices of refugee law, to intervene to prevent humanitarian crises in other countries, the relevance of this concept to refugee law is nonetheless clear. The quintessential example of an international obligation to protect due to a state’s primary failure is the United Nations Convention Relating to the Status of Refugees 1951 (“the Refugee Convention”), which requires a state party to protect a refugee from return to a country in which he or she fears persecution (in other words, the obligation of *non-refoulement*).³ The underlying idea is that the home state has failed to protect the refugee from persecution, and thus the international or surrogate scheme of protection provided by the Refugee Convention is invoked by the refugee in seeking protection in another state.

However, the responsibility to protect in the context of refugee law is now understood to involve a wider set of obligations than those set out in the Refugee Convention alone. As the UNHCR noted in its *Note on International Protection* in 2006, “there may also be persons with international protection needs who are outside the refugee protection framework, requiring finer distinctions to be made to provide protection in ways complementary to the 1951 Convention”.⁴ Indeed, while the Executive Committee of the UNHCR recently “reaffirm[ed] that the 1951 Convention Relating to the Status of Refugees together with its 1967 Protocol continue to serve as the cornerstone of the international refugee protection regime”,⁵ it immediately went on to recognize that “in different contexts, there may be a need for international protection in cases not addressed by the 1951 Convention and its 1967 Protocol”.⁶ Accordingly, it encouraged “the use of complementary forms of protection for individuals in need of international protection who do not meet the refugee definition under the 1951 Convention or the 1967

2 United Nations High Commissioner for Refugees, *Note on International Protection*, A/AC.96/1024 (12 July 2006), para 1.

3 Barbour and Gorlick argue that “[t]he historical record supports the conclusion that the grant of asylum is, or would be, in many cases the most practical, realistic and least controversial response to assisting victims of mass atrocities”, and that “[t]he grant of asylum and *non-refoulement* and the protection of IDPs as particular protection and life-saving measures, seem especially warranted for reference within the analysis, scope and meaning of R2P”; see Barbour & Gorlick, “Embracing the ‘responsibility to protect’: a repertoire of measures including asylum for potential victims”, UNHCR New Issues in Refugee Research, Research Paper No 159 (July 2008), 22–23 (<http://www.unhcr.org/research/RESEARCH/487b619b0.pdf>) (last accessed 13 March 2009).

4 United Nations High Commissioner for Refugees, above note 2 at para 5.

5 UNHCR Executive Committee, *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection* (7 October 2005), Conclusion No 103 (LVI).

6 *Ibid.*

Protocol”.⁷ The Executive Committee’s conclusion made it clear that these international protection needs were based on international law obligations — essentially international and regional human rights instruments that post-date the Refugee Convention — and were therefore to be distinguished from discretionary decisions of states to prolong stay for compassionate or practical reasons.⁸

The recognition of this wider ambit of the obligation to protect from *refoulement* is not just wishful thinking on the part of the UNHCR. It has been recognized by the relevant treaty bodies and many states have now implemented a scheme of complementary protection based on treaty obligations incorporated into domestic law. While states have always provided protection in “humanitarian” cases that fall outside the strict ambit of the Refugee Convention, the significant development in the past few decades has been a recognition that states have an obligation — not discretion — to provide protection to a wider group of persons in need.

However, while many states accept that they have obligations at international law to protect persons from *refoulement* beyond the terms of the Refugee Convention, there remains much disagreement about the scope of protection to be provided. One of the most contentious issues is whether protection is restricted only to persons who fear torture and or a violation of the right to life (narrowly understood), or whether it can include also persons whose claims rely on a deprivation of socio-economic rights on return to their country of origin — that is, whether return to violence in the form of famine, or lack of medical treatment or education, can invoke a state’s international protection obligations. It is in this area that states are much more likely to permit persons to stay only on the exercise of a humanitarian discretion, rather than provide a right to stay on this basis in domestic law.⁹ Indeed, the notion that the obligation to protect may include

7 Ibid.

8 Ibid.

9 This is exemplified in New Zealand where such issues are clearly considered in the context of assessing whether there are “exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand” pursuant to s 47(3) of the Immigration Act 1987. See, for example, *Removal Appeal No 46278* (Removal Review Authority, 30 August 2006); *Removal Appeal No 46565* (Removal Review Authority, 10 July 2008). See also Gower, “Immigrants Earn reprieve from Deportation”, *New Zealand Herald*, 11 March 2008. In addition, when considering whether to affirm the revocation of a residence permit, the Deportation Review Tribunal of New Zealand is directed not to confirm the revocation if “it is satisfied that it would be unjust or unduly harsh for the appellant to lose the right to be in New Zealand indefinitely”; see Immigration Act 1987, s 22(5). In a number of decisions, the Deportation Review Tribunal has quashed a revocation on the basis of the risk of socio-economic deprivation in the home country; see, for example, *Rouf v*

socio-economic rights has been thought to present such a threat to state sovereignty that the right to seek such protection, at least in the context of medical treatment, has been explicitly excluded from some existing and proposed domestic schemes,¹⁰ most recently in the proposed system of complementary protection to be introduced in New Zealand. It is, therefore, timely to undertake an analysis of the scope of the obligation to protect from *refoulement* in international human rights law, focusing specifically on the question whether such obligations extend to protecting from *refoulement* those who fear a deprivation of socio-economic rights on return to their home country or to another state. This article uses the exclusion on socio-economic grounds proposed in the New Zealand Immigration Bill 2007 (No 132-2)¹¹

Minister of Immigration [2007] NZDRT 2 (concerning a 15-year-old profoundly deaf Bangladeshi boy who required ongoing assistance in New Zealand for his disability); *Zaman v Minister of Immigration* (NZDRT, 024/06, 18 March 2008) (concerning a schizophrenic Bangladeshi man who had “little chance of leading a meaningful, adequate life in Bangladesh”).

10 For example, in Canada, Immigration and Refugee Protection Act (Can) (SC 2001, c 27) s 97(1) provides a right for non-citizens to obtain protection from deportation in Canada in certain circumstances, as long as “the risk is not caused by the inability of that country to provide adequate health or medical care”. It is likely that the New Zealand Immigration Bill is based on this exclusion. It is interesting to note that the complementary protection scheme recently presented to the Australian Parliament does not contain such an exception; see Migration Amendment (Complementary Protection) Bill 2009. It should also be noted that some states, such as New Zealand and Australia, exclude persons from qualification for permanent residence (outside the protection regime) on the basis of their likelihood of being a drain on the health-care system; see, for example, the discussion of the health requirements of the New Zealand Residence Policy in *Vilceanu v The Minister of Immigration* [2007] NZDRT 1, para 17, where the Tribunal sets out the Health Requirements Immigration Regulations 1999, rule 4.1: “All persons included in residence applications must meet the health requirements as set out in the Administration chapter or qualify for a waiver of the health requirements.” These regulations further provide that “if the applicant fails to meet the necessary health requirements and does not qualify for a waiver, the application may be declined”. According to rule 4.1.5, “[a]ssessment provides that a consultant physician may determine that an applicant is not of an acceptable standard of health if the physician considers that the applicant is: (i) likely to be a danger to public health, or (ii) likely to be a burden on the New Zealand health services, or (iii) unfit for the purpose of entry to New Zealand”. See also the subsequent decision of the New Zealand Court of Appeal in *Vilceanu v The Minister of Immigration* [2008] NZCA 486. There are some cases where a refused applicant has been successful on appeal; see *Removal Appeal No AAS14599* and other decisions cited in *Vilceanu v The Minister of Immigration* [2007] NZDRT 1, para 50.

11 For the Immigration Bill (No 132-2), see http://www.parliament.nz/en-NZ/PB/Legislation/Bills/4/7/d/00DBHOH_BILL8048_1-Immigration-Bill.htm (accessed on 31 August 2009).

(“the Immigration Bill”) as a method of testing the scope of complementary protection at international law.

It should be noted at the outset that this article is not concerned with the question whether a person may establish a well-founded fear of being persecuted (and thus establish a claim for refugee status) on the basis of a violation of socio-economic rights for a Refugee Convention reason. Most domestic regimes, including the New Zealand Immigration Bill, do not purport to address this issue. Further, to do so would clearly be inconsistent with international law as there is ample authority for the proposition that persecution may be so constituted.¹²

This article begins by setting out the background and proposed provisions in the New Zealand Immigration Bill, before turning to consider the concept of *non-refoulement* in international human rights law. As explained in that section, since the principle of *non-refoulement* has been implied into general human rights treaties, the task of identifying its principled basis and scope of operation is not a straightforward one. This section therefore analyses the considerable body of jurisprudence emanating from a number of key international and regional treaty bodies in order to provide a framework of analysis for the remainder of the article. The following sections then turn to focus on *non-refoulement* specifically on the basis of socio-economic rights violations, considering first the International Covenant on Economic, Social, and Cultural Rights (“the ICESCR”), followed by the International Covenant on Civil and Political Rights (“the ICCPR”).

The New Zealand Immigration Bill and Socio-Economic Rights as a Basis for Complementary Protection

New Zealand has historically implemented its obligations under the Refugee Convention in a manner that attains international best practice. The high quality of its refugee status decision-making has been noted by leading courts in the common law world, including the House of Lords, and the policy and practice of the government has often served to fill gaps in international protection. Notwithstanding this, New Zealand’s legislative regime of refugee

12 Refugee claims based on the denial of health care to those with HIV/AIDS have been recognized in the United States, Canada, and Australia. “Access to medical care and treatment is a fundamental human right and actions amounting to an effective denial may constitute persecution”; see RRT Reference N95/08165. The fact that the country of origin is poor and undeveloped, and thus has only basic services, does not preclude a claim where “people infected with HIV may be denied even the low level of care available to others ...”; see RRT Reference N94/04178. See generally Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007).

protection has suffered from a limitation, namely, that it has traditionally restricted protection only to those whose claims fall within the Refugee Convention, and not to those whose claims for protection are based on other express or implied norms of *non-refoulement* at international law.¹³ One of the most important innovations in the Immigration Bill currently before the New Zealand Parliament is, therefore, the rectification of this lacuna in international protection.¹⁴ The Bill recognizes, as a “protected person”, a person who has a claim for complementary protection under the Convention Against Torture (“the CAT”) or the ICCPR.¹⁵

However, while protection against *non-refoulement* in the case of torture is modelled very closely on the CAT,¹⁶ the New Zealand Parliament has sought to define more closely those who might be protected under the ICCPR. In particular, while a person “must be recognized as a protected person under the [ICCPR]” if there are “substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life” or to “cruel, inhuman, or degrading treatment or punishment” if deported from New Zealand,¹⁷ the proposed legislation excludes from protection those whose claim is based on “the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality”.¹⁸ A person is excluded from asserting a claim on this basis as it pertains to a risk of violation of either the right to life or the right not to be subjected to cruel or unusual treatment. Further, the language in the Immigration Bill — “*is not to be treated as arbitrary deprivation of life or cruel treatment*” — suggests that the exclusion is mandatory.

There is little explanatory material regarding this provision, but a possible rationale for it may be found in the background paper to the Immigration Act Review, which states:¹⁹

13 There has been an increasing tendency to interpret legislative provisions authorizing deportation by reference to New Zealand’s international obligations; see, for example, Geiringer, “International Law Through the Lens of *Zaoui*: Where is New Zealand at?” (2006) 17 Public L Rev 300. However, it remains the case that the existing Immigration Act only explicitly provides protection to those falling within the Refugee Convention.

14 For a detailed overview of the New Zealand Immigration Bill, see Haines, “Sovereignty Under Challenge” (2009) NZLR 149–205.

15 It should be noted that references are to the Immigration Bill as amended by the Select Committee.

16 For example, cl 120(5) of the Immigration Bill (No 132-2) states that “‘torture’ has the same meaning as in the [CAT]”.

17 See Immigration Bill (No 132-2), cl 121.

18 *Ibid*, cl 121(2)(c).

19 See *Immigration Act Review: Background Paper*, para 302.

Both the European Court of Human Rights (ECtHR) and English courts have emphasized that the ICCPR obligations do not extend to a general duty not to deport persons who are in need of medical care that will not be provided in their home country. The proposed approach relating to medical care reflects these findings and mirrors Canada's legislation.

This suggests that the rationale is based, at least in part, on a perception about what is required as a matter of international law.

There are two preliminary observations we should make at the outset. First, although the background material suggests a concern to implement a wider range of *non-refoulement* obligations at international law beyond the Refugee Convention alone, the proposed legislation is concerned only with some treaties. Most strikingly, the *non-refoulement* obligations implied into the United Nations Convention on the Rights of the Child 1989 ("the CRC")²⁰ are not incorporated, nor is any mention made of other treaties such as the ICESCR.²¹ Second, it is interesting to note that in general the drafters have not thought it necessary to define exhaustively the scope of the relevant concepts in domestic legislation, presumably leaving it open to the tribunals and courts to develop in accordance with their evolving meaning at international law. For example, there is no guidance as to the meaning of "torture", "arbitrary deprivation of life", or "cruel, inhuman, or degrading treatment". Thus, the concern emphatically to exclude claims based on lack of health care is anomalous.

It should be noted that there is a lack of clarity as to how, and to what extent, the New Zealand Immigration Bill will impact upon the existing common law presumption that domestic law, such as the power to expel, must be read consistently with international obligations that might otherwise have given rise to de facto protection against *refoulement* pursuant to New Zealand's obligations under the CAT and the ICCPR.²² This article focuses

20 New Zealand ratified the United Nations Convention on the Rights of the Child 1989 on 6 April 1993, and there are no relevant reservations in place.

21 New Zealand ratified the International Covenant on Economic, Social, and Cultural Rights 1966 on 28 December 1978, and has only entered a partial reservation in respect of Art 8. Submissions were made to the Immigration Act Review that these and other treaties should have been incorporated: see *Immigration Act Review: Summary of Submissions* (November 2006).

22 See *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC). As Rodger Haines notes, this issue was not argued before the New Zealand Supreme Court in *Zaoui* and is, therefore, to be understood as obiter dicta; see Haines, "National Security and *Non-Refoulement* in New Zealand: Commentary on *Zaoui v Attorney-General (No 2)*", in McAdam (ed), *Forced Migration, Human Rights and Security* (2008) 63, 75. However, as Haines also notes (at 76), the New Zealand Government had conceded in *Zaoui* that "it is obliged to comply with the relevant international obligations protecting Mr Zaoui from

only on the issues raised by the Immigration Bill's incorporation of a complementary protection regime that excludes protection based on certain socio-economic rights, and does not purport to assess whether there may be any remaining scope for these issues to be dealt with under the auspices of the common law doctrine.

Non-refoulement in International Human Rights Law

Unlike the Refugee Convention and the CAT, the other international human rights treaties that are frequently implicated in an analysis of complementary protection obligations do not contain explicit *non-refoulement* provisions.²³ Rather, the relevant interpretative bodies, specifically the United Nations Human Rights Committee ("the UNHRC") in the case of the ICCPR, and the European Court of Human Rights in the case of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the ECHR"), have implied obligations of *non-refoulement* from the primary obligations expressed in the respective conventions.²⁴ While there

return to threats of torture or the arbitrary taking of life"; see *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC), para 75. In addition to the previously established common law presumption, reliance was also placed in *Zaoui* on the New Zealand Bill of Rights Act 1990. See also Geiringer, above note 13.

- 23 However, recent treaties may signal a new approach; see, for example, the International Convention for the Protection of All Persons from Enforced Disappearance 2006, Art 16, which provides that "[n]o State Party shall expel, return (*refouler*), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance". This Convention was adopted on 20 December 2006 but, as of 13 September 2009, is not yet in force; see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en.
- 24 The ICCPR creates the United Nations Human Rights Committee ("the UNHRC") as the body responsible for its implementation; see especially ICCPR, Art 40. The views of the UNHRC, especially as regards the First Optional Protocol, "represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol"; see United Nations Human Rights Committee, *General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights* (2008) CCPR/C/GC/33, para 13. In addition, "[t]he character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations"; *ibid*, para 15. For discussion of this issue, see

is disagreement about their scope, in the main, states have accepted the existence of implied *non-refoulement* obligations, at least in connection with the right to life and the right not to be subjected to torture, or to cruel, inhuman, or degrading treatment.

However, controversies have emerged as a result of developments in international law in recent decades that have recognized and given force to the theory of the “permeability of rights” — the notion that rights thought traditionally to fall within the category of “civil and political” may in fact have application to socio-economic rights.²⁵ Examples include the recognition that homelessness may engage the right to privacy or even to life,²⁶ the notion that the obligation of non-discrimination can apply to welfare entitlements,²⁷ and the finding that inhuman or degrading treatment may be constituted by a deprivation of socio-economic rights.²⁸ This has led to jurisprudence and commentary as to whether a prohibition on *non-refoulement* could extend to an obligation not to return a person to a country where the risk of violation of the right either to life or not to be subjected to inhuman or degrading treatment takes the form of a deprivation of socio-economic rights. This issue has, however, been highly controversial. Indeed, the doctrine as applied to socio-economic rights has been referred to as an “extension of an extension”²⁹ in the United Kingdom case law, which tends to question its legitimacy altogether. The legislative limitation in the New Zealand Immigration Bill is an attempt, clearly and unequivocally, to prevent any such extension by decision-makers in New Zealand, at least in the context of medical treatment.

At the heart of the question of the legality at international law of exceptions, such as that contained in the New Zealand Immigration Bill, is the proper scope of the implied *non-refoulement* concept, including how far it extends within the treaties to which it is most commonly applied, and also whether and to what extent it applies to other human rights treaties. In order to address the key questions with which this article is concerned, it is there-

Rishworth, “The Rule of International Law?”, in Huscroft & Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (2002). The New Zealand Supreme Court defers to the views of the UNHRC; see Geiringer, above note 13 at 314.

25 See generally Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007) ch 4.

26 *Ibid* at 185.

27 *Ibid*.

28 *Ibid* at 187–188.

29 See *AJ (Liberia) v Secretary of State for the Home Department* [2006] EWCA Civ 1736, para 12, where Hughes LJ cited the English Court of Appeal’s decision in *N v Secretary of State for the Home Department* [2004] 1 WLR 1182 (EWCA), paras 37 & 46. In *N*, Laws LJ stated (at para 36) that this “‘extra-territorial’ effect constitutes an exceptional extension of the Treaty obligations ...”.

fore necessary to consider the origin of, principled basis of, and conceptual explanation for this concept. Although there is much jurisprudence and scholarly discussion related to the doctrine of complementary protection, there is surprisingly little clarity concerning the principled basis for its implication and scope. In order to respond to the above criticisms and to ascertain the scope of the doctrine we need to start from a position of clarity regarding the basis of state responsibility for *non-refoulement*.

In answering this question, it is clear that a number of possible bases for state responsibility can be immediately discounted. First, it is well established that, although sometimes referred to as an extra-territorial application of human rights obligations, or a “foreign case”,³⁰ this is a misnomer. The implied concept of *non-refoulement*, like an express *non-refoulement* obligation, does not relate to conduct undertaken by a state outside its territory or jurisdiction. Rather, the act that is potentially prohibited is the expulsion, which occurs in the territory of the expelling state. Thus, it is not relevant to consider the basis on which a state may be liable for acts undertaken outside the territory. Nor is it based on the idea that states are responsible for human rights abuses anywhere in the world. As the UNHRC noted in *Kindler v Canada*:³¹

If a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person’s rights that may later occur in the other jurisdiction. In that sense a State party clearly is not required to guarantee the rights of persons within another jurisdiction.

Second, the implied prohibition on *non-refoulement* is not concerned with attributing responsibility for unlawful action carried out by one state (the receiving state) to another (the sending state). This is because it is only in exceptional cases that one state is responsible for the actions of another, none of which apply in this context.³² Specifically, these are not cases where one state directs, controls,³³ or coerces another state to commit an act.³⁴

30 This phrase is regularly invoked in the United Kingdom cases in this area.

31 (1993) Communication No 470/1991, UN Doc CCPR/C/48/D/470/1991, para 6.2.

32 Crawford, *The International Law Commission’s articles on state responsibility: introduction, text, and commentaries* (2002) 147.

33 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001), Art 17.

34 Ibid, Art 18. See also Kaelin, “Limits to Expulsion under the International Covenant on Civil and Political Rights”, in Salerno (ed), *Diritti Dell’Uomo, Estradizione ed Espulsione* (2003) 143, 158.

Third, it is not a situation where the sending state is liable on the basis that it has aided or assisted in the commission of an internationally wrongful act.³⁵ This is because the deportation or expulsion cannot be said to be carried out “with a view to facilitating the commission of the wrongful act”.³⁶ Even more fundamentally, a state can only aid and assist another where the assistance facilitates a second state in violating the second state’s international obligations.³⁷ However, it is clear that what is being assessed in these cases is the responsibility of the sending state, not the responsibility of the receiving state. As the European Court of Human Rights explained in *Soering v United Kingdom*,³⁸ “there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the [ECHR] or otherwise”.³⁹ Indeed, in many cases, the receiving state is either not a party to the treaty or not a party to the adjudicative procedure.⁴⁰

This assists in clarifying what *is not* the basis for state responsibility, but leaves open the question as to what *is* the basis of state responsibility for the consequences of expulsion. In seeking to answer this question, Kaelin refers to the well-established proposition that human rights obligations contain both negative aspects (a duty to respect or refrain from violating rights) and positive aspects (a duty to protect by preventing others from violating rights). He suggests that the explanation for the implied *non-refoulement* doctrine set out by the UNHRC is fundamentally based on the duty to protect, whereas the analysis adopted by the European Court of Human Rights is concerned with the duty to abstain.⁴¹ Kaelin concludes that the justification of the European Court of Human Rights leads “to more convincing results”.⁴² In contrast, Noll sees the most plausible theoretical justification for the jurisprudence of the European Court of Human Rights as related to the obligation to protect.⁴³

35 Ibid, Art 16. See also Crawford, above note 32.

36 See Crawford, above note 32 at 149. See also Kaelin, above note 34 at 159.

37 Ibid at 148.

38 (1989) 11 EHRR 439 (ECtHR).

39 Ibid at para 91.

40 See *Kindler v Canada* (1993) Communication No 470/1991, UN Doc CCPR/C/48/D/470/1991. See also Kaelin, above note 34 at 157; Crawford, above note 32 at 145.

41 Kaelin, above note 34 at 159–161.

42 Ibid at 162.

43 Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection, and the Common Market of Deflection* (2000) 468–472. See also den Heijer, “Whose Rights and Which Rights? The Continuing Story of *Non-Refoulement* under the European Convention on Human Rights” (2008) 10 *Eur J Migration & Law* 277, 291: “If one insists on labelling the prohibition of *refoulement* as either a positive or negative obligation, the most tenable solution probably is to consider removal cases as hybrid cases which impose both positive and negative obligations on an expelling State.”

However, a close reading of the developing jurisprudence of these supervisory tribunals suggests that it is not possible to describe their reasoning as neatly based on one theory or another. Rather, it is possible to discern three possible theoretical explanations in the reasoning of the UNHRC and the European Court of Human Rights and other relevant international tribunals such as the Inter-American Commission on Human Rights.

The first and broadest possible basis for the *non-refoulement* obligation could be characterized as an “effectiveness” principle. As the European Court of Human Rights noted in *Soering v United Kingdom*:⁴⁴

In interpreting the [ECHR], regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms ... Thus, the object and purpose of the [ECHR] as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.

The European Court of Human Rights then explained why it was legitimate to depart from its normal practice of declining to rule upon potential violations in the cases where the potential violations are said to occur as a result of a deportation or expulsion. The Court explained that departure was necessary “in order to ensure the effectiveness of the safeguard provided by [Art 3]”.⁴⁵ In other words, the obligations imposed on states by human rights conventions could be entirely undermined if a state could disregard these obligations in sending a person to a place in which it was foreseeable they would suffer a violation of rights. This analysis might be justified as a matter of treaty interpretation on the basis that it takes into account the context, object, and purpose of the treaty in determining the scope of the obligations that it imposes.⁴⁶

A more direct and arguably more legitimate basis for the *non-refoulement* doctrine is that state responsibility is related to the sending state’s duty to protect. For example, the UNHRC held in *ARJ v Australia* that:⁴⁷

States parties to [the ICCPR] must ensure that they carry out all their legal commitments, whether under domestic law or under agreements with other states, in a manner consistent with the Covenant. Relevant for the consideration of this issue is the State party’s obligation, under article 2, paragraph 1, of the Covenant, *to ensure to all individuals within its territory*

44 (1989) 11 EHRR 439 (ECtHR), para 87.

45 Ibid at para 90.

46 See the Vienna Convention on the Law of Treaties 1969, Art 31.

47 (1996) Communication No 692/1996, UN Doc CCPR/C/60/D/692/1996, paras 6.8–6.9 (emphasis added).

and subject to its jurisdiction the rights recognized in the Covenant. ... If a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.

In *Ahani v Canada*⁴⁸ the UNHRC even more explicitly referred to this concept in stating:⁴⁹

The Committee emphasizes that, as with the right to life, the right to be free from torture requires not only that the State party refrain from torture but take steps of due diligence to avoid a threat to an individual of torture from third parties.

The language of “ensure” and “due diligence” in these extracts suggests that the UNHRC was referring to a state’s duty not only to respect rights by refraining from violating them, but also to protect them, by ensuring that others do not violate them.⁵⁰

In particular, the concept of “due diligence” refers to the standard of protection that international law can legitimately impose on a state.⁵¹ This analysis then essentially extends the state’s duty to protect against violations by non-state actors within its own territory to violations that might be carried out by other states or non-state actors within other states. In both cases, the sending state has an ability to influence whether the violation occurs — in its own territory, by directly offering protection, and extra-territorially by not exposing the person to the risk of harm.⁵²

The third and most direct theory explaining the *non-refoulement* obligation more closely resembles the notion that the state *is itself* in violation of its own duty to respect rights (or rather to refrain from violating them directly) in referring to the state’s expulsion or deportation as a crucial

48 (2004) Communication No 1051/2002, UN Doc CCPR/C/80/D/1051/2002.

49 *Ibid* at para 10.6 (emphasis added).

50 As the UNHRC explains, “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities”; see United Nations Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) CCPR/C/21/Rev.1/Add.13.

51 A concept particularly developed by the European Court of Human Rights.

52 See Noll, above note 43 at 467–473.

step in the ultimate violation. For example, the UNHRC stated in *Kindler v Canada*:⁵³

The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, *Canada established the crucial link in the causal chain that would make possible the execution of the author.*

This seems to suggest that a state party may be in breach of its duty to respect, or to refrain from violating, rights when its actions have been, or will be, a crucial element in the violation of the applicant's rights — almost a “but for” causation analysis. This analysis is even clearer in the jurisprudence of the European Court of Human Rights. In the seminal decision in *Soering v United Kingdom*⁵⁴ the European Court of Human Rights explained that the responsibility of the state was established on the basis of “its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment”.⁵⁵

The most direct theory of state responsibility was adopted in *D v United Kingdom*,⁵⁶ where the European Court of Human Rights held that:⁵⁷

... the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of [Art] 3.

This suggests that it is the deportation itself that is to be regarded as inhuman (and thus in violation of Art 3), rather than that the state party was in violation because its deportation would foreseeably lead to inhuman treatment. As Kaelin observes, the act of exposing someone to a serious risk of inhuman

53 (1993) Communication No 470/1991, UN Doc CCPR/C/48/D/470/1991, para 10.6 (emphasis added).

54 (1989) 11 EHRR 439 (ECtHR).

55 Ibid at para 91. See also *Chahal v United Kingdom* (1996) 23 EHRR 413 (ECtHR). In *Mamatkulov v Turkey* (2005) 41 EHRR 494 (ECtHR), para 69, the European Court of Human Rights reiterated that “the nature of the Contracting States’ responsibility under [Art] 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment”. The Inter-American Commission on Human Rights has taken a similar approach to implying a *non-refoulement* obligation into Art 1 of the American Declaration of the Rights and Duties of Man; see *The Haitian Centre for Human Rights v United States* (1997) Report No 51/96, IACHR 550, 1997 WL 835742, paras 167–168.

56 (1997) 24 EHRR 423 (ECtHR).

57 Ibid at paras 50–53. That this was the basis of this decision was reaffirmed in later decisions; see, for example, *Pretty v United Kingdom* (2002) 35 EHRR 403 (ECtHR), para 53.

treatment by an act of removal “is in itself a treatment which causes intense anguish and suffering and violates the basic dignity of human beings”.⁵⁸

In all of these cases, the test is said to be one of foreseeability, that is, “[t]he foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on”.⁵⁹

The key issue for present purposes relates to the significance of these different theoretical explanations for state responsibility in terms of identifying the scope of the implied *non-refoulement* doctrine. In particular, does the choice of conceptual basis determine which rights are subject to the *non-refoulement* doctrine? Analyzing the question through the lens of either effectiveness or a state’s duty to protect seems likely to produce the result that the *non-refoulement* principle could apply to all rights in the relevant conventions. This is because there is no self-evident basis on which one can distinguish between the rights that a state must protect and those that it need not. Certainly, Art 2(1) of the ICCPR, which requires states to “respect and to ensure” rights, applies to all rights in the Covenant. Similarly, all rights could potentially be undermined if they could be ignored in deportation decisions, thus suggesting that the effectiveness principle would also result in the obligation of *non-refoulement* applying to all rights.

Turning to the more direct analysis, namely, that which is based on the notion that a state may be in violation of its obligation to respect if it carries out an act that is a necessary step in the chain of events ultimately leading to a rights violation, it again seems that this doctrine could apply to all rights. Perhaps the only conceptual approach outlined above that is clearly and obviously specific to only a limited category of rights might be the direct analysis apparently adopted in *D v United Kingdom*⁶⁰ — that is, where the deportation itself is treated as inhuman. If this is the true basis of at least the reasoning of the European Court of Human Rights in this area, then it might suggest that the *non-refoulement* principle is confined to this treaty obligation because it might be difficult to expand this to include other rights (except to the extent that they amount to cruel or degrading treatment).

The difficulty in reaching a conclusion on this point is that neither the treaty bodies nor the European Court of Human Rights have explained the scope of the implied *non-refoulement* doctrine by clear reference to the underlying rationale for the imposition of state responsibility in this area.

58 Kaelin, above note 34 at 161.

59 *Kindler v Canada* (1993) Communication No 470/1991, UN Doc CCPR/C/48/D/470/1991, para 6.2, reiterated in *Ng v Canada* (1994) Communication No 469/1991, UN Doc CCPR/C/49/D/469/1991, para 6.2. See also *Soering v United Kingdom* (1989) 11 EHRR 439 (ECtHR), para 86.

60 (1997) 24 EHRR 423 (ECtHR).

Further, while they have attempted to provide some insight into the full scope of the *non-refoulement* principle, there is no single clear and consistent explanatory doctrine to emerge from a review of the case law.

Perhaps the most consistent theme is that attempts to limit the scope of the *non-refoulement* doctrine have centred on the severity of the violation that is at issue. Both the UNHRC and the Committee on the Rights of the Child have indicated that the *non-refoulement* principle is capable of applying to more than just the right to life and the right not to be subjected to torture, and to cruel and unusual treatment. However, in seeking to explain its scope, both treaty bodies engage the concept of “irreparable harm”. In relation to the nature of states parties’ obligations, the UNHRC has stated:⁶¹

Moreover, the [Art] 2 obligation requiring that States Parties respect and ensure [the ICCPR] rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, *where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by [Arts] 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.*

Similarly, the Committee on the Rights of the Child has explained in its General Comment on non-citizen children:⁶²

Furthermore, in fulfilling obligations under [the CRC], States shall not return a child to a country where there are *substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under [Arts] 6 and 37 of the [CRC]*, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.

The language of “such as” and “by no means limited to” makes it clear that the treaty bodies do not confine the scope of the *non-refoulement* principle to the rights mentioned. However, this is apparently limited by the requirement that the foreseeable violation of rights amounts to “irreparable harm”. It is not clear where the language of “irreparable harm” is derived from, as it is not present in the jurisprudence of the UNHRC relating to the *non-refoulement* principle, nor in its General Comments dealing specifically

61 United Nations Human Rights Committee, above note 50 at para 12 (emphasis added).

62 United Nations Committee on the Rights of the Child, *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin* (2005) CRC/GC/2005/6, para 27 (emphasis added).

with Arts 6 and 7 of the ICCPR. On the contrary, the UNHRC's decisions adopt very broad language that suggests that the *non-refoulement* principle applies to all rights, and indeed the UNHRC has found a number of claims admissible where the *non-refoulement* principle was based on rights other than Arts 6 and 7.⁶³ One possibility may be that the UNHRC has borrowed the term "irreparable harm" from its rules of procedure concerning interim measures,⁶⁴ although, if this is so, its relevance to such a different context is not self-evident. In any event, the difficulty with the adoption of this concept as a method of delimiting the scope of the *non-refoulement* doctrine is that it is, as Noll points out, "ambiguous and difficult to pin down".⁶⁵ It thus, Noll argues, "opens up a new arena for indeterminacy, turning on the question of exactly what is reparable and what is not".⁶⁶ Interestingly, the UNHRC has not sought in its jurisprudence to assess violations by reference to the concept of "irreparable harm". Instead, at least where the expulsion concerns Art 6 or Art 7, the only question is whether the harm feared amounts to "inhuman or degrading treatment" or a violation of the right to life. Nor has the UNHRC referred to the concept of "irreparable harm" in assessing the admissibility of claims based on other rights violations.

In contrast to the UNHRC, the European Court of Human Rights has engaged with this issue more directly. In many decisions since *Soering v United Kingdom*⁶⁷ the European Court of Human Rights has alluded to the possibility of other rights being implicated, but has avoided finally adjudicating the question as to whether the *non-refoulement* doctrine extends to rights other than Art 3 of the ECHR.⁶⁸ However, in *Z and T v*

63 See, for example, *ARJ v Australia* (1996) Communication No 692/1996, UN Doc CCPR/C/60/D/692/1996; *Judge v Canada* (2003) Communication No 829/1998, UN Doc CCPR/C/78/D/829/1998. Although it is interesting to note that the concept of "irreparable harm" was used by the European Court of Human Rights in *Soering v United Kingdom* (1989) 11 EHRR 439 (ECtHR), para 90.

64 See UNHRC Rules of Procedure (2005) CCPR/C/3Rev.8, rule 92: "The Committee may, prior to forwarding its Views on the communication to the State party concerned, inform that State of its Views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation."

65 Noll, above note 43 at 466.

66 *Ibid.*

67 (1989) 11 EHRR 439 (ECtHR).

68 In *Soering v United Kingdom* (1989) 11 EHRR 439 (ECtHR), the first decision in which the European Court of Human Rights identified the implied *non-refoulement* doctrine, the Court noted (at para 113) that it did "not exclude that an issue might exceptionally be raised under [Art] 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country". For a detailed discussion of the case law on provisions other than Art 3 in this context, see den Heijer, above note 43 at 280–285.

United Kingdom,⁶⁹ the sole question for the Court was whether the doctrine could extend to Art 9 of the ECHR, that is, the right to freedom of thought, conscience, and religion. The case before the Court sought to challenge the basis of the decision of the House of Lords in *R (on the application of Ullah) v Special Adjudicator*,⁷⁰ in which their Lordships had decided that, while the *non-refoulement* principle was capable of applying to all ECHR rights, an applicant would be required to establish “at least a real risk of a flagrant violation of the very essence of the right” before other provisions could become engaged.⁷¹ In explaining its decision to reject the challenge to the *Ullah* line of reasoning, the European Court of Human Rights began by noting the decision in *Soering*, before explaining that:⁷²

The case-law that followed [*Soering*], and which applies equally to the risk of violations of [Art] 2, is based on the fundamental importance of these provisions, whose guarantees it is imperative to render effective in practice ... The Court emphasized in that context the absolute nature of the prohibition of [Art] 3 and the fact that it encapsulated an internationally accepted standard and abhorrence of torture, as well as the serious and irreparable nature of the suffering risked. Such compelling considerations do not automatically apply under the other provisions of the [ECHR]. On a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country where the conditions are in full and effective accord with each of the safeguards of the rights and freedoms set out in the [ECHR] (see *Soering*, cited above ... and *F v the United Kingdom* [ECtHR, Application No 17341/03, 22 June 2004]), where the applicant claimed that he would be unable to live openly as a homosexual if returned to Iran).

In this passage, the rationale for the doctrine is variously described as: the fundamental importance of the rights and the need to render such important rights effective; the absolute (and non-derogable) nature of the rights in question; the fact that the obligations encapsulate an “internationally accepted standard”; and the fact that their violation will lead to serious and irreparable harm. The European Court of Human Rights has frequently emphasized the absolute and non-derogable nature of Art 3 in this context although, as Noll argues, deducing a “hierarchical structure from the textual manifestations

69 (ECtHR, Application No 27034/05, 28 February 2006).

70 [2004] 2 AC 323 (HL).

71 *Z and T v United Kingdom* (ECtHR, Application No 27034/05, 28 February 2006), 4.

72 *Ibid* at 6.

of delimitations of rights” is problematic.⁷³ In any event, as displayed in the quotation above, the Court apparently undermined the determinacy of these factors in acknowledging that many other rights in the ECHR, including Art 9, are central “foundations of a democratic society”, and that the non-refoulement doctrine can apply to rights that are not absolute (such as the right to a fair trial in Art 6, which may be derogated from in emergencies).⁷⁴ In addition, it is of course possible to point to many other rights that reflect an “internationally accepted standard”, and whose violation will lead to irreparable harm (although note the inherent difficulty with this concept, as discussed above).

Perhaps the clearest explanation for a concern to limit the *non-refoulement* principle to violations of Arts 2 and 3, and to extreme and flagrant violations of the other rights, is a policy based one. As the European Court of Human Rights went on to explain in *Z and T v United Kingdom*,⁷⁵ while freedom of religion is indeed a foundation of a democratic society, it is, “first and foremost the standard applied within the Contracting States, which are committed to democratic ideals, the rule of law, and human rights”.⁷⁶ To impose an obligation on a Contracting State not to expel a person whose other rights might be violated on return, would impose “an obligation on Contracting States effectively to act as indirect guarantors of freedom of worship for the rest of the world”.⁷⁷ In other words, the ECHR is primarily designed to protect Europeans, and persons from other states cannot expect to enjoy the same level of protection as those who enjoy primary protection under the ECHR. This certainly raises a question as to the universality of human rights.⁷⁸

However, leaving the universality question aside, it should be noted that while the European Court of Human Rights arguably thought it legitimate to consider policy concerns in this context, an issue to which we will return later, the UNHRC has not been so willing. Rather, as noted above, it has explicitly left open the possibility that a challenge to an expulsion decision

73 Noll, above note 43 at 462, where the author quotes from Zuhlke & Pastille, *Extradition and the European Convention — Soering Revisited* (1999) that “tracing superiority with the help of non-derogable rights dwells on the assumption that those rights are non-derogable because they are superior — a classic circular argument”.

74 See also Noll, above note 43.

75 (ECtHR, Application No 27034/05, 28 February 2006).

76 *Ibid* at 7.

77 *Ibid*.

78 See, for example, Higgins, *Problems and Process: International Law and How We Use It* (1994) 96–98: “The non-universal, relativist view of human rights is in fact a very state-centred view and loses sight of the fact that human rights are human rights and not dependent on the fact that states, or groupings of states, may behave differently from each other so far as their politics, economic policy, and culture are concerned.”

may be based on rights other than those found in Arts 6 and 7. The view that the *non-refoulement* doctrine should be further restricted has been expressed only in dissent. In *Judge v Canada*⁷⁹ an individual opinion was submitted by Christine Chanet in which she agreed with the position of the UNHRC that Canada violated the author's right to life by extraditing him to a state in which he would face capital punishment,⁸⁰ but objected to the fact that the UNHRC "declared itself competent to consider the author's arguments concerning a possible violation of Art 14, paragraph 5, of the Covenant" as well.⁸¹ Although she thought that taking the position that *non-refoulement* can apply in relation to a potential violation of any or all ICCPR rights "would certainly be a step forward in the realization of human rights", she argued that "legal and practical problems would immediately arise" that tended against such an application.⁸² However, this is so far a minority view.

A less policy-based, and perhaps more convincing, explanation for distinguishing between the absolute rights (in Arts 2 and 3 of the ECHR and Arts 6 and 7 of the ICCPR) and the "qualified rights" in those same treaties was provided by Lord Bingham of Cornhill in *R (on the application of Ullah) v Special Adjudicator*, namely that:⁸³

The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case — where the right will be completely denied or nullified in the destination country — that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state.

In other words, in the case of absolute and non-derogable rights, no possible justification for a violation can be claimed either by the sending or by the receiving state. Thus, once a violation is foreseeable, a state is prohibited from exposing a person to that violation, including by deporting or expelling the person. In contrast, in the case of a qualified right, it may be that the violation could be justified by the sending state (on the basis of the importance "of operating firm and orderly immigration control")⁸⁴ or by the receiving state

79 (2003) Communication No 829/1998, UN Doc CCPR/C/78/D/829/1998.

80 This was a reversal of the earlier position in *Kindler v Canada* (1993) Communication No 470/1991, UN Doc CCPR/C/48/D/470/1991.

81 *Judge v Canada* (2003) Communication No 829/1998, UN Doc CCPR/C/78/D/829/1998, 20.

82 *Ibid.*

83 [2004] 2 AC 323 (HL), para 24, citing *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 702, para 111.

84 *Ibid.*

under one of the permitted limitations. But as Lord Bingham of Cornhill explained, this is not a balance that a court is “well placed to assess in the absence of representations by the receiving state whose laws, institutions, or practices are the subject of criticism”.⁸⁵ Therefore, it is necessary to require foreseeability of a flagrant or extreme violation in order to be satisfied that state responsibility is engaged.⁸⁶ On this analysis, all rights are potentially relevant, but the question is the nature or degree of the potential violation.⁸⁷

Having considered in some depth the underlying rationale for the implied *non-refoulement* obligation in general human rights treaties, we now turn to consider the scope of this doctrine in the specific situation where a person seeks to resist deportation/expulsion on the basis of a fear of socio-economic rights violations in his or her home country or a third state.

***Non-Refoulement* and Socio-Economic Rights: The International Covenant on Economic, Social, and Cultural Rights**

In considering whether the principle of *non-refoulement* is capable of applying so as to restrain a state from removing a person where the feared harm takes the form of socio-economic rights violations, the logical starting point is the ICESCR, since that is the key international instrument for the protection

85 *Ibid.* It should be noted that, although one is not assessing the responsibility of the receiving state, the question remains whether a violation is likely to occur in the receiving state, which may involve assessing whether there would be any legitimate basis on which the violation could be justified in the receiving state, thus making it not a violation of either the ECHR or the ICCPR, as the case may be.

86 See also *EM (Lebanon) v Secretary of State for the Home Department* [2009] 1 All ER 559 (HL), in which their Lordships revisited the correct test to be applied in cases where expulsion is said to engage the “qualified” rights in the ECHR. While their Lordships reiterated the test adopted in *R (on the application of Ullah) v Special Adjudicator* [2004] 2 AC 323 (HL), they all emphasized the high threshold required, explaining that it is tantamount to requiring a complete denial or nullification of the right in question. While most of their Lordships appeared to reiterate Lord Bingham of Cornhill’s reasoning for adopting this test, Lord Hope of Craighead emphasized the policy concerns expressed by the European Court of Human Rights in *Z and T v United Kingdom* (ECtHR, Application No 27034/05, 28 February 2006) and *N v United Kingdom* (2008) 47 EHRR 39 (ECtHR), para 13. See also *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, in which the House of Lords discussed the application of the “flagrant breach” tests in the context of Arts 5 and 6 of the ECHR, ultimately rejecting the claims on this basis.

87 For a detailed and thoughtful consideration of this issue in the distinct but related context of secondary refugee movements, see Legomsky, “Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection” (2003) 15:4 *International Journal of Refugee Law* 567 at 645–654.

of socio-economic rights. Unlike in the case of the ICCPR, however, the relevant treaty body that oversees the ICESCR — the Committee on Economic, Social, and Cultural Rights — has yet to consider the relevance of the doctrine of *non-refoulement* to that instrument. Further, there is an absence of any scholarship suggesting that such an approach is even possible. We must therefore answer the question according to first principles.

The most obvious concern about applying the concept of *non-refoulement* to the ICESCR is the fact that that instrument is often said not to impose immediate and binding obligations on states, but rather to impose only obligations of progressive implementation.⁸⁸ This is on the basis of Art 2(1) of the ICESCR, which provides that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The concern is that it would be impossible for a sending state ever to ascertain whether its decision to expel would expose a person to a rights violation in the receiving state, given that such an assessment would involve an evaluation of matters well beyond the expertise or capability of the sending state. In other words, how could a sending state ever assess whether the receiving state had committed sufficient resources to fulfil its legal obligations?

However, such an approach ignores the fact that some provisions of the ICESCR are, on their own terms, immediately binding, for example, Art 3 (equality between men and women), Art 7(a)(i) (equal pay), Art 8 (right to form trade unions and to strike), Art 10(3) (protection of children from exploitation), Art 13(2)(a) (free primary education), and Art 13(3) (freedom of parents to choose the type of education for their children).

Second, it ignores the fact that all rights in the ICESCR impose two key duties of an immediate nature: the guarantee in Art 2(2) that rights will be exercised without discrimination on specified grounds, and the obligation in Art 2(1) to “take steps”. The obligation of non-discrimination in Art 2(2) is

⁸⁸ Even where the ICESCR has been mentioned in the *non-refoulement* context, it has been dismissed on the basis that the rights that it contains “are not readily enforceable either domestically or at the international level, in part due to their progressive realization”; see McAdam, *Complementary Protection in International Refugee Law* (2007) 164. See also Goodwin-Gill & McAdam, *The Refugee in International Law* (3rd ed, 2007) 314. See also Legomsky, above note 87 at 649.

“subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of [for example] education ...”⁸⁹

The second obligation of an immediate nature — to “take steps” — is in turn understood as having two components. The first is that, inherent in the obligation to take steps and to achieve progressively the rights in the ICESCR, there is a strong presumption against regressive steps. At a minimum, states must refrain from interfering directly or indirectly with the enjoyment of a right. For example, a violation of the right to food can occur where a state repeals or suspends legislation necessary for the continued enjoyment of the right to food, denies access to food for particular groups, or prevents access to humanitarian food in internal conflicts or other emergency situations.⁹⁰ To take another common example, the Committee on Economic, Social, and Cultural Rights has made clear that “forced evictions” (defined as the “permanent or temporary removal against their will of individuals, families, and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”) are “prima facie incompatible with the requirements of the Covenant”.⁹¹ Therefore, “in view of the nature of the practice of forced evictions, the reference in Art 2.1 to progressive achievement based on the availability of resources will rarely be relevant”. The state “must itself refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions”.⁹² These are by nature duties of immediate obligation.

The second component to the obligation to take steps is that states have a “core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant”.⁹³ The Committee on Economic, Social, and Cultural Rights has stated that:⁹⁴

Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.

89 Committee on Economic, Social, and Cultural Rights, *General Comment No 13: The Right to Education* (1999) E/C.12/1999/10, para 31.

90 Committee on Economic, Social, and Cultural Rights, *General Comment No 12: The Right to Adequate Food* (1999) E/C.12/1999/5, para 19.

91 Committee on Economic, Social, and Cultural Rights, *General Comment No 7: The Right to Adequate Housing: Forced Evictions* (1997) E/C.12/1997/4, para 1.

92 *Ibid* at para 8.

93 Committee on Economic, Social, and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations* (1990) E/1991/23, para 10.

94 *Ibid*.

The Committee on Economic, Social, and Cultural Rights has elaborated on these minimum core obligations in relation to a number of specific rights in the ICESCR, including the rights to education, food, health, and water, and also the right to work.⁹⁵

As a result of these obligations of an immediate nature imposed on states by the ICESCR, determining whether a person is likely to be subjected to a violation of socio-economic rights on return is not as complicated as might initially have been assumed. Where the person fears a violation based on the receiving state's failure to respect rights (by withdrawing or preventing access to rights or actively denying them to a particular segment of the population) or failure to protect rights (by being unable or unwilling to protect against violation by non-state actors), the assessment is arguably no more complicated than where a civil and political right is at issue. This suggests that the mere fact that ICESCR rights "are not readily enforceable either domestically or at the international level, in part due to their progressive realization"⁹⁶ may not be sufficient to justify a rejection of the relevance of ICESCR to the *non-refoulement* context.

The other possible objection to implying a *non-refoulement* obligation into the ICESCR may be that, as well as being subject to Art 2(1), all rights in the ICESCR are also subject to Art 4, which provides that states parties "may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". In *Rahman v Minister of Immigration*⁹⁷ — one of the few domestic cases to have considered specifically the potential for *non-refoulement* obligations to arise by virtue of the ICESCR — McGechan J held that Art 4 permitted New Zealand to return a person to a country in which his ICESCR rights may be at risk on the basis of the need to preserve "the general welfare of New Zealand society".⁹⁸ However, this does not appear to be a valid reading of

95 See respectively Committee on Economic, Social, and Cultural Rights, *General Comment No 12: The Right to Adequate Food* (1999) E/C.12/1999/5; *General Comment No 13: The Right to Education* (1999) E/C.12/1999/10; *General Comment No 14: The Right to the Highest Attainable Standard of Health* (2000) E/C.12/2000/4; *General Comment No 15: The Right to Water* (2002) E/C.12/2002/11; *General Comment No 18: The Right to Work* (2005) E/C.12/GC/18.

96 McAdam, above note 88 at 164.

97 (HC Wellington, AP 56/99 & CP49/99, 26 September 2000, McGechan J).

98 *Ibid* at para 62. His Honour also went on to explain (at para 64) that the Deportation Review Tribunal's decision was valid because it weighed the socio-economic needs of the appellant "in the balance against New Zealand's own needs; a process entirely permissible under the Covenant". It should be noted that this appeared to be the key basis for rejecting the argument under the ICESCR, although the Judge also referred (at para 59) to the fact that the ICESCR is limited "by being to maximum of 'available'

Art 4 since that provision is “primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State”.⁹⁹ This is exemplified in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*,¹⁰⁰ where the International Court of Justice held that restrictions on the enjoyment of economic, social, and cultural rights by Palestinians living in the occupied territories as a result of Israel’s construction of the wall could not be justified by “military exigencies or by requirements of national security or public order”.¹⁰¹ This confirms the narrow reading of the Art 4 exception by the Committee on Economic, Social, and Cultural Rights, and casts doubt on the legitimacy of seeking to deny the existence of, or justify a violation of, any implied *non-refoulement* obligation in the ICESCR on the basis of general public order (including immigration) concerns.

Having dismissed these potential objections, we can see that once it is possible to identify that there is a foreseeable risk of an ICESCR violation taking place or continuing in the receiving state on return, it is arguable that either the sending state’s duty to respect ICESCR rights (ie to not carry out the crucial link in the causal chain) or its duty to protect (ie to take steps of due diligence) could prevent it from sending a person back to their home state. Indeed, the Committee on the Rights of the Child has implicitly accepted as much in relation to the CRC — a treaty that eschews the traditional dichotomy between civil and political rights and socio-economic rights by incorporating both sets of rights in the one treaty. The Committee has emphasized that there “is no simple division or authoritative division, of human rights in general or of Convention rights, into the two categories ... the Committee believes that economic, social, and cultural rights, as well as civil and political rights, should be regarded as justiciable”.¹⁰² Accordingly, in elaborating the *non-refoulement* concept implied in the CRC, the Committee on the Rights of the Child has urged states parties to assess the risk of return “in an age and gender-sensitive manner” and to “take into account the

resources, and to achieving Nirvana progressively. It is not an open-ended or immediate obligation.” The Judge also noted (at para 62) that the present was “not an extreme case”. I am very grateful to Claudia Geiringer for alerting me to this case.

99 Committee on Economic, Social, and Cultural Rights, *General Comment No 13: The Right to Education* (1999) E/C.12/1999/10, para 42.

100 (2004) ICJ Rep 136 (ICJ).

101 *Ibid* at para 137.

102 Committee on the Rights of the Child, *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child* (2003) CRC/GC/2003/5, para 6.

particularly serious consequences for children of the insufficient provision of food or health services”.¹⁰³

More recently, other actors within the United Nations system have turned their attention to the issue of *non-refoulement* in the context of socio-economic rights violations, especially the right to food. The (immediate past) United Nations Special Rapporteur on the Right to Food expressed the view that, under the ICESCR, states have the obligation to “respect, protect, and fulfil the right to food of all people, living within their jurisdiction or in other countries”, which means that “Governments have a legal obligation to help the refugees from hunger”.¹⁰⁴ This seems to rely on both the fact that there is no territorial limitation in the ICESCR,¹⁰⁵ as well as the obligation on states in Art 2(1) to “take steps, individually and through international assistance and co-operation, especially economic and technical” to realize the rights in the ICESCR, which arguably implies extra-territorial obligations.¹⁰⁶ Indeed,

103 Committee on the Rights of the Child, *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin* (2005) CRC/GC/2005/6, paras 3 & 27.

104 Special Rapporteur on the Right to Food, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”* (19 January 2007) A/HRC/4/30, para 64.

105 Compare Art 2(1) of the ICCPR, in which states undertake to apply the rights in the Covenant to “all individuals within its territory and subject to its jurisdiction”. Art 2(1) of the ICESCR contains no such limitation. See further *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2004) ICJ Rep 136 (ICJ), paras 107–112. Of course, there may be some difficulty in reconciling the notion that extra-territorial obligations explain an implied *non-refoulement* obligation, as discussed above.

106 There is an ongoing debate as to whether states have extra-territorial obligations under the ICESCR. Some have argued that activities undertaken by a state that are directly attributable to it, such as dumping unsafe food on the market in developing countries, dumping toxic waste in developing countries, or even refusing governments and citizens of developing states access to patents for cheap drugs/medicine for HIV/AIDS, are violations of the obligation to respect the right to health in Art 12 of the ICESCR; see Coomans, “Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social, and Cultural Rights”, in Coomans & Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004) 183, 187. Indeed, support for this proposition can be found in a number of *General Comments* issued by the Committee on Economic, Social, and Cultural Rights; see Committee on Economic, Social, and Cultural Rights, *General Comment No 8: The Relationship Between Economic Sanctions and Respect for Economic, Social, and Cultural Rights* (1997) E/C.12/1997/8; Committee on Economic, Social, and Cultural Rights, *General Comment No 12: The Right to Adequate Food* (1999) E/C.12/1999/5 and *General Comment No 15: The Right to Water* (2002) E/C.12/2002/11. See further Craven, “The Violence of Dispossession: Extra-territoriality and Economic, Social, and Cultural Rights”, in

the new expert body of the United Nations Human Rights Council — the Advisory Committee — has recommended that the United Nations Human Rights Council and the United Nations Secretary-General “make available their good offices so as to extend the right to *non-refoulement* to hunger refugees”.¹⁰⁷ The latter statement may reflect a desire to develop the law progressively rather than to express a view regarding existing obligations.¹⁰⁸ However, it suggests that this is an evolving area and thus states parties must be careful before assuming that the concept of *non-refoulement* does not apply in relation to the ICESCR.¹⁰⁹

In sum, to the extent that the ICESCR can be interpreted as imposing a *non-refoulement* obligation on states parties, an attempt to exclude one important right, namely the right to health, is clearly inconsistent with the obligations that the ICESCR creates. Notwithstanding this, it remains the case that there is insufficient authority at present for holding states accountable for *refoulement* on the basis of the ICESCR. It is possible that the recent adoption by the General Assembly of an Optional Protocol to the ICESCR (to be opened for signature in 2009), which will allow the Committee on Economic, Social, and Cultural Rights to receive and consider communications from individuals or groups from states parties to the ICESCR that also accede to the Protocol, may facilitate the development of this principle in the future.¹¹⁰ In the meantime, it is far less controversial to base our analysis on the treaties to which a *non-refoulement* obligation has

Baderin & McCorquodale, *Economic, Social and Cultural Rights in Action* (2007) 75–77.

107 See Human Rights Council Advisory Committee, *Report to the Human Rights Council on the First Session of the Advisory Committee* (15 August 2008) A/HRC/AC/2008/1/L.11, 1/6. See also Pillay, “Promoting a Broader Understanding of Refugee Law: The Jurisprudence of the Human Rights Treaty Bodies as a Source of Interpretation”, Opening Keynote Address, 8th World Conference of the International Association of Refugee Law Judges, Cape Town (28 January 2009), 8.

108 See, for example, Special Rapporteur on the Right to Food, above note 103 at para 67, where the Special Rapporteur refers to the need for refugee protection to be “enlarged” to protect refugees from hunger, but it is not clear whether this refers to international or domestic legal regimes.

109 See Alston, “US Ratification of the Covenant on Economic, Social, and Cultural Rights: The Need for an Entirely New Strategy” (1990) 84 *Am J Int L* 365, 371, where the author explains that the interpretation of the obligations in human rights treaties such as the ICCPR and the ICESCR is “not solely a matter for a state party itself to decide” since “[v]esting such [auto-interpretative] authority in a state would clearly undermine the concept of accountability, which the [ICESCR] is designed to achieve”. Thus, the question of a state’s compliance with the ICESCR is ultimately subject to determination by the ICESCR. I am grateful to James Hathaway for his thoughts on this point.

110 See Report of the Human Rights Council: Report of the Third Committee (28 November 2008) A/63/435.

clearly been attached. We, therefore, now turn to an analysis of the scope of the obligation of *non-refoulement* in the ICCPR, focusing particularly on the extent to which it is capable of application to socio-economic rights violations.

Non-Refoulement and Socio-Economic Rights: The International Covenant on Civil and Political Rights

The ICCPR is primarily concerned with the protection of civil and political rights. However, as discussed above, in recent decades the notion that rights can be neatly compartmentalized into two broad and neatly distinguishable categories — “civil and political” on the one hand, and “socio-economic” on the other — has been shown to have “limited conceptual integrity”.¹¹¹ First, a consideration of the text of the ICCPR and the ICESCR reveals that they both contain provisions of a socio-economic nature, including at least some aspects of the rights of self-determination, equal protection, protection from arbitrary interference with the home, freedom of association, as well as minority group rights (including in relation to cultural and language rights), rights of childhood education, and rights to family and work.¹¹²

Second, both the treaty bodies and regional bodies, such as the UNHRC and the European Court of Human Rights, have interpreted the largely civil and political rights contained in the ICCPR and the ECHR in a manner that incorporates obligations of a socio-economic nature.¹¹³ In its General Comment on the right to life, for example, the UNHRC has emphasized that this right is not to be “narrowly interpreted” and that “it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics”.¹¹⁴ The UNHRC has explained that when reporting on compliance with the obligations under Art 6 relating to the right to life, states should provide “data on birth rates and on pregnancy and childbirth-related deaths of women ... [g]ender-disaggregated data ... on infant mortality rates”, and “information on the particular impact on

111 Foster, above note 12 at 189.

112 Ibid at 182–183.

113 In one of the earliest cases in which this occurred, the European Court of Human Rights remarked that “there is no water-tight division separating [the sphere of economic and social rights] from the field covered by the [ECHR]”; see *Airey v Ireland* [1979] 2 EHRR 305 (ECtHR), para 26.

114 United Nations Human Rights Committee, *General Comment No 6: The Right to Life* (1982), para 5.

women of poverty and deprivation that may pose a threat to their lives”.¹¹⁵ Furthermore, in concluding observations pertaining to particular countries, the UNHRC has noted that a failure to take adequate steps to address the situation of homelessness may compromise the right to life of those persons.¹¹⁶ Similarly, the European Court of Human Rights has noted that “an issue may arise under Art 2 [right to life] of the [ECHR] where it is shown that the authorities of a Contracting State put an individual’s life at risk through the denial of health care which they have undertaken to make available to the population generally”.¹¹⁷ The Court has also made clear that the requirement to respect the right to life “lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction”,¹¹⁸ which may include protection from environmental harm.¹¹⁹

In respect of Art 7 — the prohibition on cruel, inhuman, or degrading treatment or punishment — the UNHRC has routinely found states in violation where they have subjected persons within their control, such as prisoners and detainees, to a deprivation of socio-economic rights.¹²⁰ Unlike the ICESCR, which is subject to resource constraints as explained above, a violation of the ICCPR or the ECHR cannot be justified on this basis. Thus, for example, in *Kalashnikov v Russia*,¹²¹ the European Court of Human Rights rejected Russia’s argument that squalid prison conditions did not amount to a violation of Art 3 of the ECHR because they were a consequence of Russia’s economic difficulties and were suffered by most detainees in Russia.¹²²

115 United Nations Human Rights Committee, *General Comment No 28: Equality of Rights between Men and Women* (2000) CCPR/C/21/Rev.1/Add.10, para 10.

116 Foster, above note 12 at 185.

117 *Cyprus v Turkey* (2002) 35 EHRR 30 (ECtHR), para 219.

118 *Ibid.*

119 See *Öneryildiz v Turkey* [2002] ECHR 491 (ECtHR), para 71, cited in Loucaides, “Environmental Protection Through the Jurisprudence of the European Convention on Human Rights”, in Loucaides, *The European Convention on Human Rights: Collected Essays* (2007) 177.

120 See, for example, *C v Australia* (2002) Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999; *Williams v Jamaica* (1997) Communication No 609/1995, UN Doc CCPR/C/61/D/609/1995; *Smith & Stewart v Jamaica* (1999) Communication No 668/1995, UN Doc CCPR/C/65/D/668/1995; *Rouse v The Philippines* (2005) Communication No 1089/2002, UN Doc CCPR/C/84/D/1089/2002. For similar jurisprudence in the European Court of Human Rights, see *Kalashnikov v Russia* (2002) 36 EHRR 587 (ECtHR).

121 (2002) 36 EHRR 587 (ECtHR).

122 See Rohl, “Fleeing Violence and Poverty: *Non-refoulement* obligations under the European Convention of Human Rights”, UNHCR New Issues in Refugee Research, Working Paper No 111 (January 2005), 16–17. See also *Öneryildiz v Turkey* [2002] ECHR 491 (ECtHR).

The vital question for our purposes is whether the obligation not to remove a person when certain that his or her civil and political rights are at risk of violation on return can apply to a situation when the feared harm involves socio-economic deprivation. In other words, do the permeability or interdependence arguments apply equally in the removal context? If not, is there a principled reason for distinguishing between a “domestic” and “foreign” case in this regard?¹²³ In light of the discussion above, which established that the clearest and least contestable articles of the ICCPR applicable to the expulsion context are Art 6 (the right to life) and Art 7 (the right not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment), this section will focus on the applicability of those articles to socio-economic deprivation. Since the New Zealand Immigration Bill specifically excludes claims based on an inability of the country of origin to provide adequate medical treatment, but does not otherwise limit the meaning of Arts 6 or 7, this part will be divided into two sections. First, the question whether the New Zealand exclusion is legitimate at international law will be considered by reference to case law that has considered whether “inhuman or degrading treatment” can be constituted by a deprivation of medical treatment. Second, the question whether forms of socio-economic deprivation, other than a lack of medical treatment, may be relevant to a *non-refoulement* claim will be considered.

A *Deprivation of health and medical care under Arts 6 and 7 of the ICCPR*

While the UNHRC has made it clear in General Comments, Concluding Observations, and Individual Communications that the implied *non-refoulement* obligation applies to at least Arts 6 and 7, and that those provisions can implicate a violation of socio-economic rights, there has been little consideration of the question of whether a state is prevented from removing a person where the Art 6 or Art 7 violation concerns socio-economic rights.

One of the only instances in which this issue has been considered is in *C v Australia*,¹²⁴ a communication brought by an Iranian non-citizen who

123 There is confusion in the United Kingdom case law on this question. In *ZT v Secretary of State for the Home Department* [2005] EWCA Civ 1421, para 28, Buxton LJ stated that “it has never been suggested that different rules of law apply” as between “foreign and domestic cases”. Many of the other cases in this area, however, assume that there is some relevance to the distinction: see, for example, *J v Secretary of State for the Home Department* [2005] EWCA Civ 629, para 33; *EM (Lebanon) v Secretary of State for the Home Department* [2009] 1 All ER 559 (HL), para 19.

124 (2002) Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999.

claimed that Australia had violated Art 7 of the ICCPR in two respects: first, in detaining him for a prolonged period pending his determination of refugee status, and second, in proposing to deport him to Iran where he would be unable to obtain treatment for the psychiatric illness brought about by his detention in Australia. The UNHRC found that both aspects of the Art 7 claim were made out. In explaining its reasons in relation to the second aspect of the claim, the UNHRC referred to a decision of the Australian Administrative Appeals Tribunal that had found it “unlikely that the only effective medication (Clozaril) and back-up treatment would be available in Iran”.¹²⁵ The UNHCR then stated:¹²⁶

In circumstances where the State party has recognized a protection obligation towards the author, the Committee considered that deportation of the author to a country where it is unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State party’s violation of the author’s rights would amount to a violation of [Art] 7 of the [ICCPR].

This is a significant decision in that the UNHRC found that an expulsion may engage Art 7 where the feared harm on return will take the form of the unavailability of medical treatment. However, the associated exceptional circumstances of that case — that the applicant had at some stage been found to be a refugee (although was said to have ceased to be so) and that the illness was actually caused by the expelling state party — suggest that the applicability of this particular decision to other situations is limited.

The question whether a lack of medical treatment can be considered “inhuman or degrading treatment” has been considered far more intensely by the European Court of Human Rights in the context of interpreting the almost identically worded Art 3 of the ECHR: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Interestingly, the background paper to the Immigration Act Review, referred to above, clearly accepts the relevance of the jurisprudence of the European Court of Human Rights and the United Kingdom courts, which have also interpreted the ECHR as it pertains to domestic law, notwithstanding that New Zealand is not of course a party to the ECHR. This is entirely appropriate, given the cross-fertilization of ideas that frequently occurs in the interpretation of similar obligations at international law.

Although an inability to benefit from medical care could potentially enliven consideration of the right to life, most cases have been considered by the European Court of Human Rights under the rubric of the prohibition

125 *Ibid* at para 8.5.

126 *Ibid*.

in Art 3 of the ECHR on “inhuman or degrading treatment”.¹²⁷ How do we define “cruel, inhuman, or degrading treatment”? The European Court of Human Rights has emphasized that “ill-treatment must attain a minimum level of severity if it is to fall within the scope of Art 3 [of the ECHR]”. It should be noted at this point that a claim that treatment will amount to “degrading treatment” requires a higher threshold than “persecution”.¹²⁸ The European Court of Human Rights has also explained that the assessment of the “minimum level of severity” is relative, and “it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age, and state of health of the victim”.¹²⁹

The first case in which the European Court of Human Rights was asked to consider whether a state might be prevented from expelling a person where the harm feared took the form of a lack of medical treatment was *D v United Kingdom*,¹³⁰ a case concerning a St Kitts citizen with advanced AIDS, whose removal from the United Kingdom would “hasten his death on account of the unavailability of similar treatment in St Kitts”.¹³¹ In adjudicating this claim, the Court noted that, until that point, it had applied the *non-refoulement* principle only in contexts “in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection”.¹³² However, the Court went on to explain that, in light of the “fundamental importance” and “absolute character” of Art 3 of the ECHR, it was entitled to “scrutiniz[e] an applicant’s claim under Art 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article”.¹³³ The Court then went on to note that the removal of D from the

127 Usually this is because the European Court of Human Rights has said that once a claim under Art 3 of the ECHR is made out, it is not necessary to consider Art 2; see, for example, *D v United Kingdom* (1997) 24 EHRR 423 (ECtHR), para 59.

128 This is because “persecution” can clearly encompass a wider range of human rights violations. Thus, the fact that a socio-economic claim is not sufficient to warrant an Art 7 or Art 3 violation does not mean that it cannot form the basis of a successful refugee claim if the nexus is established; see, for example, *AH (Sudan) v Secretary of State for the Home Department* [2007] EWCA Civ 297, para 30.

129 *N v United Kingdom* (ECtHR, Application No 26565/05, 27 May 2008), para 29.

130 (1997) 24 EHRR 423 (ECtHR).

131 *Ibid* at para 40.

132 *Ibid* at para 49.

133 *Ibid*.

United Kingdom would entail “the most dramatic consequences for him”. In particular:¹³⁴

It is not disputed that his removal will hasten his death. There is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering. Any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St Kitts ... there is no evidence of any other form of moral or social support. Nor has it been shown whether the applicant would be guaranteed a bed in either of the hospitals on the island, which, according to the Government, care for AIDS patients.

The European Court of Human Rights thus concluded that in view of these exceptional circumstances and “bearing in mind the critical stage now reached in the applicant’s fatal illness”, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent state in violation of Art 3 of the ECHR.¹³⁵ Importantly, once the treatment was found to have attained the requisite level of severity, the obligation not to return was said not to be subject to any derogation or exaction. Rather, it was absolute. Therefore, the applicant’s criminal activity in the United Kingdom could not justify his removal, however “reprehensible” it might have been. The absolute nature of the protection in Art 3 of the ECHR has been reiterated repeatedly in subsequent case law.¹³⁶

One further point should be made about *D v United Kingdom*.¹³⁷ Although the case has mostly been seen as concerned only with the unavailability of medical treatment,¹³⁸ the reasoning of the Court included reference to the general conditions of poverty and squalor in which D would be required to live, in addition to the lack of medical treatment.¹³⁹ The significance of this is that it highlights that inhuman or degrading treatment, in the removal

134 Ibid at para 52.

135 Ibid at para 53.

136 See, for example, *Saadi v Italy* [2008] INLR 621 (ECtHR), para 127, citing previous authority on this point.

137 (1997) 24 EHRR 423 (ECtHR).

138 This is how *D v United Kingdom* (1997) 24 EHRR 423 (ECtHR) is usually described in later cases, see especially *N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)* [2005] 2 AC 296 (HL), para 15.

139 See McAdam, above note 87 at 165.

context, might be constituted by deprivations of socio-economic rights other than medical treatment.

*D v United Kingdom*¹⁴⁰ represented a significant conceptual development in the jurisprudence of the European Court of Human Rights and prompted a number of Member States of the Council of Europe to amend their domestic law and policy to accommodate it. For example, the French *Code de l'Entrée et du Séjour des Étrangers et du Droit d'Asile* now sets out a list of persons who may not be the subject of an expulsion order (other than in exceptional circumstances).¹⁴¹ This list includes:¹⁴²

A foreigner who habitually resides in France and who is benefiting from medical treatment, the lack of which could result in exceptionally grave consequences for him, on the condition that he could not effectively benefit from appropriate treatment in the receiving country.

In the United Kingdom, the *Asylum Policy Instructions* have been amended to note that:¹⁴³

Applicants may claim that they suffer from a serious medical condition and that their return and the consequent withdrawal of medical treatment being received in the UK would amount to inhuman or degrading treatment contrary to Article 3. Medical claims will only reach the threshold for Article 3 in rare and extreme circumstances.

As these extracts suggest, while states have accepted the important conceptual shift represented in *D v United Kingdom*,¹⁴⁴ they have been careful to limit it, at least in the medical cases, to exceptional situations. This emphasis on the “exceptional” nature of an Art 3 claim based on lack of medical treatment

140 (1997) 24 EHRR 423 (ECtHR).

141 For example, in the case of behaviour that “threatens the fundamental interests of the State, or which is linked to terrorist activity, or which constitutes deliberate provocation of discrimination, hatred, or violence against a person or a group of persons”; see *Code de l'Entrée et du Séjour des Étrangers et du Droit d'Asile*, Art L521-3 (translation by Nawaar Hassan).

142 *Code de l'Entrée et du Séjour des Étrangers et du Droit d'Asile*, Art L521-3 (translation by Nawaar Hassan).

143 United Kingdom Border Agency, *Asylum Policy Instructions* (October 2006), 15. There is also interesting case law from other jurisdictions suggesting that the poor state of health of the applicant together with a lack of proper medical treatment in the home country may warrant a grant of subsidiary protection; see, for example, *O v Independent Federal Asylum Board (UBAS)* (26 September 2007) Case 1282: Administrative Court (Austria), Case No 2006/19/0521 (translation by Anne Kallies).

144 (1997) 24 EHRR 423 (ECtHR).

is in fact consistent with the way in which the European Court of Human Rights explained its reasoning in *D*, as set out above. Indeed, the European Court of Human Rights has repeatedly emphasized that the ECHR does not permit non-citizens to remain in the territory of a Contracting State “in order to continue to benefit from medical, social, and other forms of assistance provided by the expelling state”.¹⁴⁵ Rather, the European Court of Human Rights has continued to emphasize the extreme circumstances that gave rise to the successful claim in *D*, particularly by distinguishing most other subsequent claims from *D* and thus finding them inadmissible.¹⁴⁶

The European Court of Human Rights was recently presented with the opportunity to revisit the scope of *D v United Kingdom*¹⁴⁷ in *N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)*,¹⁴⁸ a recent case involving the decision by the United Kingdom to expel a woman suffering from HIV/AIDS to Uganda. The decision to expel was upheld by the House of Lords and *N* challenged this decision in the European Court of Human Rights.¹⁴⁹ Rather than taking the opportunity to overrule *D*, in fact the European Court of Human Rights in *N v United Kingdom*¹⁵⁰ reiterated the position articulated in *D* that:¹⁵¹

[T]he decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under [Art] 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling.

145 Ibid at para 54.

146 The post-*D* case law is discussed at length by the House of Lords in *N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)* [2005] 2 AC 296 (HL), paras 37–50. As their Lordships noted (at para 34), the European Court of Human Rights “has never found a proposed removal of an alien from a Contracting State to give rise to a violation of [Art] 3 on grounds of the applicant’s ill-health”. However, some post-*D* cases were settled after the European Commission of Human Rights found them admissible; see, for example, *BB v France* (1998) RJD 1998-IV 2595 (EComHR). For a general discussion of post-*D* case law, see *N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)* [2005] 2 AC 296 (HL), paras 32–45.

147 (1997) 24 EHRR 423 (ECtHR).

148 [2005] 2 AC 296 (HL).

149 For discussion of the House of Lords decision in *N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)* [2005] 2 AC 296 (HL), see Lester, “Socio-Economic Rights, Human Security, and Survival Migrants: Whose Rights? Whose Security?”, in Edwards & Ferstman (eds), *Human Security and Non-Citizens: Law, Policy, and International Affairs* (2010 forthcoming).

150 (2008) 47 EHRR 39 (ECtHR).

151 Ibid at para 42.

The European Court of Human Rights explained that in *D*, “the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin, and had no family there willing or able to care for him or provide him with even a basic level of food, shelter, or social support”.¹⁵² In contrast, in *N v United Kingdom*,¹⁵³ the European Court of Human Rights found that due to the treatment available in the United Kingdom, the applicant was not “at the present time critically ill”.¹⁵⁴ The evidence suggested that if she were deprived of her medical treatment, her condition would “rapidly deteriorate and she would suffer ill-health, discomfort, pain, and death within a few years”.¹⁵⁵ However, although the Court accepted that “the quality of the applicant’s life and her life expectancy would be affected if she were returned to Uganda”, the European Court of Human Rights rejected her claim under Art 3 of the ECHR on the basis that:¹⁵⁶

The rapidity of the deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment, support, and care, including help from relatives, must involve a certain degree of speculation, particularly in view of the constantly evolving situation as regards the treatment of HIV and AIDS worldwide.

Although the European Court of Human Rights did not overrule *D v United Kingdom*,¹⁵⁷ it does appear to have been at pains to stress its exceptional nature, and thereby to have limited any potential for an expansive approach to medical care cases in the future.

A number of observations about the reasoning of the European Court of Human Rights can be made. First, it is somewhat strange that the Court justified the decision primarily on the hypothetical nature of the assessment to be made, especially given that this is an issue in every removal case, regardless of the facts (as explained above). This is particularly curious in this case as there seems to have been clear, undisputed evidence as to the consequences of withdrawing treatment. Second, the European Court of Human Rights appears to have created “an element of paradox” in that, while *N* was not dying at the time that the expulsion decision was made, that was only because she was in receipt of treatment that was clearly going to

152 Ibid.

153 (2008) 47 EHRR 39 (ECtHR).

154 Ibid at para 50.

155 Ibid at para 47.

156 Ibid at para 50.

157 (1997) 24 EHRR 423 (ECtHR).

cease on her removal.¹⁵⁸ The paradox lies in the fact that advances in medical treatment for HIV/AIDS have considerably prolonged the life expectancy and quality of life for sufferers since that available at the time of *D v United Kingdom*¹⁵⁹ meaning that it is now almost impossible to establish that, at the time of removal, a person is “close to death”, even though they may well be in such a position as soon as the decision to expel is implemented. It might also be noted that requiring the person to be effectively dying seems to ignore the fact that “degrading treatment” does not need to amount to a loss of life — otherwise Art 3 would have no independent operation.¹⁶⁰ Further, it ignores the fact that the test is one of foreseeability — that is, the foreseeability of the consequences of return.

A third observation, which arguably makes the most sense of the decision of the European Court of Human Rights in *N v United Kingdom*,¹⁶¹ is that it demonstrates a clear and unequivocal concern with policy considerations. In justifying its limited approach to medical cases, the European Court of Human Rights argued that, “inherent in the whole of the [ECHR] is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”.¹⁶² The European Court of Human Rights then went on to state:¹⁶³

Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of [Art] 3 in the [ECHR] system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, [Art] 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdictions. A finding to the contrary would place too great a burden on the Contracting States.

158 The phrase “element of paradox” was used in *ZT v Secretary of State for the Home Department* [2005] EWCA Civ 1421, para 12.

159 (1997) 24 EHRR 423 (ECtHR).

160 In *N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)* [2005] 2 AC 296 (HL), para 13, Lord Nicholls of Birkenhead alluded to this dilemma by asking: “why is it unacceptable to expel a person whose illness is irreversible and whose death is near, but acceptable to expel a person whose illness is under control but whose death will occur once treatment ceases (as well may happen on deportation)?” His Lordship nonetheless went on to dismiss the appeal.

161 (2008) 47 EHRR 39 (ECtHR).

162 *Ibid* at para 44.

163 *Ibid*.

Although we have already noted above the reference by the European Court of Human Rights to policy issues in discussing the scope of the implied *non-refoulement* doctrine, this passage from *N v United Kingdom*¹⁶⁴ is significantly more far-reaching as it suggests that not only are policy reasons able to justify a limited application of the *non-refoulement* principle to the full range of rights in the ECHR, but such concerns also permit exceptions to the absolute nature of the protection in Art 3 in certain expulsion cases. This results in a differentiated understanding of the same right depending on whether the person is a European Union citizen seeking protection against violation of Art 3 of the ECHR within a state party,¹⁶⁵ or a non-citizen liable to removal.¹⁶⁶ While this may be possible (albeit difficult) to justify in respect of the question of which rights may be protected under the *non-refoulement* principle, it is impossible to justify as a matter of principle in respect of the scope of Art 3 of the ECHR, which, as the European Court of Human Rights has repeatedly reminded us, is absolute.¹⁶⁷ Indeed, this was emphasized by the joint dissenting opinion of Judges Tulkens, Bonello, and Spielman in *N v United Kingdom*.¹⁶⁸ As the Judges noted, the majority of the Court added “worrying policy considerations” to its reasoning.¹⁶⁹ They expressed their “strong disagree[ment]” with the “highly controversial” statement that a balancing exercise is inherent in the whole ECHR. As the Judges noted, “the balancing exercise in the context of [Art] 3 was clearly rejected by the Court in its recent *Saadi v Italy* judgment”.¹⁷⁰ In *Saadi v Italy*,¹⁷¹ the Court stated:¹⁷²

Since protection against the treatment prohibited by [Art] 3 is absolute, that provision imposes an obligation not to ... expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from the rule ...

164 (2008) 47 EHRR 39 (ECtHR).

165 See, for example, *R (on the application of Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396 (HL), where such policy concerns were not permissible.

166 See McAdam, above note 87 at 168, where the author refers to this as a “geographically based rights hierarchy”.

167 The impossibility of justifying this position was explicitly acknowledged by Sedley LJ in *ZT v Secretary of State for the Home Department* [2005] EWCA Civ 1421, paras 41–42.

168 (2008) 47 EHRR 39 (ECtHR).

169 *Ibid* at para 6 (joint dissenting opinion).

170 *Ibid* at para 7 (joint dissenting opinion).

171 [2008] INLR 621 (ECtHR).

172 *Ibid* at para 138. Interestingly, Haines suggests that the balancing concerns introduced into the medical treatment cases “may force a re-examination of the unexplained ruling that the rights of citizens and of the State to exist in safety and security are irrelevant under [Art] 3 of the ECHR”; see Haines, above note 22 at 86.

The minority also sharply rebuked the majority Judges for their clear concern about floodgates and budgetary issues — again inconsistent with established jurisprudence, as discussed above, and also, in the view of the dissenters, unjustified as a matter of fact.¹⁷³

The question remains as to where this leaves domestic legislation that seeks to exclude from protection those whose claims rest solely on a lack of medical treatment in the home state. Regardless of the criticism that can be leveled at the European Court of Human Rights' restrictive approach to interpretation of Art 3 of the ECHR in this context, it remains the case that Art 3 (and, therefore, presumably Art 7 of the ICCPR) is capable of applying to a situation in which a person's claim is based on "the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality".¹⁷⁴ It may be that an exceptional case must be made out, as suggested by *N v United Kingdom*,¹⁷⁵ but it is still possible.

Indeed, so much is borne out by an analysis of post-*N* decisions in the United Kingdom courts. For example, in *CA v Secretary of State for the Home Department*,¹⁷⁶ the intended removal of a woman whose (unborn) child was at risk of contracting HIV and who would not have access to adequate treatment to prevent transmission of infection was held to violate Art 3 of the ECHR, "since there will be substantial risk of exposing the child to HIV/AIDS and this would amount to exposing the appellant [the mother] to inhumane or degrading treatment".¹⁷⁷ This was on the basis that, "[t]o see a new born child develop HIV is capable of being inhumane and degrading treatment particularly where it could have been prevented with adequate [care]".¹⁷⁸ In *AJ (Liberia) v Secretary of State for the Home Department*,¹⁷⁹ a claim by a 17-year-old former child-soldier was remitted to the United Kingdom Asylum and Immigration Tribunal because it had failed to consider

173 See *N v United Kingdom* (2008) 47 EHRR 39 (ECtHR), para 8 (joint dissenting opinion).

The unsatisfactory nature of the treatment of this issue by both the House of Lords and the European Court of Human Rights in *N* has led Eve Lester to question whether a better approach to resolving these issues would be to ask whether "a state has an obligation to take steps to protect the human security of the individual concerned, either at an individual level or at the level of her community"; see Lester, above note 149.

174 See New Zealand Immigration Bill, cl 121(2)(c).

175 (2008) 47 EHRR 39 (ECtHR).

176 [2004] EWCA Civ 1165. This and the decisions below are classified as "post-*N*" as they were handed down after the House of Lords decision in *N*, although prior to the European Court's affirmation of the Lords' approach.

177 *Ibid* at para 25.

178 *Ibid*.

179 [2006] EWCA Civ 1736.

whether, having “no money, no home, and no support”, the applicant “would obtain the necessary medication in Liberia on return”.¹⁸⁰

Accordingly, to the extent then that domestic legislation, such as is proposed in the New Zealand Immigration Bill, precludes such a claim, it is arguably inconsistent with obligations under the ICCPR.

It is interesting, however, to note that there is some ambiguity in the Immigration Bill as it currently stands. To recall, the Bill proposes to exclude from protection those whose claim is based on:¹⁸¹

... the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality.

In its terms, the Bill does not exclude all claims related to medical treatment, only those where the country is unable to provide medical care at all or care of a sufficient quality. This section clearly prevents a claim where a person is from a country that simply does not provide at all the treatment that the person needs, but there are two scenarios that may not fall within the words of the exclusion. First, it is not clear whether a person could still make a claim where their country is able to provide health or medical care, but imposes a charge on access to this treatment that the applicant cannot afford;¹⁸² and second, it is not clear whether a person could make a claim where there is evidence that their country is able to provide access to medical treatment, but is unwilling to do so either generally or in the particular case.

As a matter of statutory interpretation, it is arguable that the exclusion plainly leaves open the possibility that a claim based on the unwillingness of a state to provide medical care or free medical care may be possible. However, it is important to note that the same issue has arisen in respect of the similar Canadian provision, on which the New Zealand Immigration Bill is based, and the Canadian Federal Court of Appeal in *Covarrubias v Canada*¹⁸³ has now rejected the argument that a claim can be made where

180 Ibid at para 30.

181 See New Zealand Immigration Bill, cl 121(2)(c).

182 This is clearly a relevant factor still considered in the United Kingdom courts, even after *N v United Kingdom* (2008) 47 EHRR 39 (ECtHR). For example, in *AJ (Liberia) v Secretary of State for the Home Department* [2006] EWCA Civ 1736, para 30, the English Court of Appeal quashed the decision of the Asylum and Immigration Tribunal on the basis that it should have considered “the availability to the claimant of whatever mechanisms or facilities exist in the destination country”. Taking into account that the applicant “will have no money, no home and no support, and the medical infrastructure is exiguous at best”, Hughes LJ (with whom Kay LJ and Sir Mark Potter agreed) questioned the Asylum and Immigration Tribunal’s conclusion that the applicant would be able to obtain the necessary medication on return to Liberia: ibid at para 30.

183 [2007] 3 FCR 169 (Can FCA).

a country has the “financial ability to provide emergency medical care, but chooses, as a matter of public policy, not to provide such care freely to its underprivileged citizens”.¹⁸⁴ Although the Federal Court in *Singh v Canada*¹⁸⁵ had previously acknowledged that “it is not entirely clear what Parliament’s intent was in this regard”,¹⁸⁶ the Federal Court of Appeal in *Covarrubias v Canada*¹⁸⁷ concluded that the words “inability to provide adequate medical services” must include situations where “a foreign government decides to allocate its limited public funds in a way that obliges some of its less prosperous citizens to defray part or all of their medical expenses”.¹⁸⁸ The Court’s reasoning is very much based on pragmatic considerations, namely that any other interpretation “would require this Court to inquire into the decisions of foreign governments to allocate their public funds and possibly second-guess their decisions to spend their funds in a different way than they would choose”.¹⁸⁹

On the other hand, the Federal Court of Appeal went on to find that the exclusion should not be interpreted “so broadly as to exclude any claim in respect of health care”.¹⁹⁰ Rather:¹⁹¹

The wording of the provision clearly leaves open the possibility for protection where an applicant can show that he faces a personalized risk to life on account of his country’s unjustified unwillingness to provide him with adequate medical care, where the financial ability is present. For example, where a country makes a deliberate attempt to persecute or discriminate against a person by deliberately allocating insufficient resources for the treatment and care of that person’s illness or disability, as has happened in some countries with patients suffering from HIV/AIDS, that person may qualify under the section, for this would be refusal to provide the care and not inability to do so. However, the applicant would bear the onus of proving this fact.

“Inability”, therefore, includes inability either to provide any medical treatment or to provide medical treatment that is free of charge (or at least affordable), but it does not include unwillingness to provide medical care. Thus, claims based on unwillingness may still be made out in Canada, as

184 *Ibid* at para 25.

185 [2004] 3 FCR 323.

186 *Ibid* at para 23–24.

187 [2007] 3 FCR 169 (Can FCA).

188 *Ibid* at para 38.

189 *Ibid*.

190 *Ibid* at 39.

191 *Ibid*.

exemplified in *Re X*,¹⁹² in which the Immigration and Review Board of Canada concluded that “the exception in subsection 97(1)(b)(iv) does not apply to this claim, as the risk to the claimant’s life arises from the unwillingness of the Zimbabwe government to take reasonable steps to make adequate health care available to its citizens”.¹⁹³ This same analysis will presumably apply in New Zealand when the Immigration Bill comes into force.

But does such a distinction between “inability” and “unwillingness” to provide medical treatment make sense as a matter of international law? Of course, in the context of refugee claims, a claim will most clearly be made out where there is such an intentional deprivation, mainly because it is otherwise difficult to satisfy the nexus clause. But given the absence of the nexus requirement in claims based on complementary protection, does it make sense to differentiate between claims based on “inability” and those based on “unwillingness”?

Interestingly, the European Court of Human Rights seems to have latched on to this distinction as a way of justifying its decision in *N v United Kingdom*¹⁹⁴ when stating that Art 3 of the ECHR “principally applies to prevent a deportation or expulsion where the risk of ill-treatment in the receiving country emanates from intentionally inflicted acts of the public authorities there or from non-State bodies when the authorities are unable to afford the applicant appropriate protection”.¹⁹⁵ The Court has justified a “high threshold” in medical removal cases on the basis that “the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country”.¹⁹⁶ This tends to suggest that the threshold required to be met by an applicant will be lower when the lack of medical treatment is a result of deliberate action on the part of the state of origin.

However, this appears to be in direct conflict with existing authority (cited also by the majority in *N*) that makes it clear that “the suffering which flows from naturally occurring illness, physical or mental, may be covered by [Art] 3, where it is, or risks being exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the

192 (Immigration and Refugee Board of Canada, RPD File No TA7-00927, 25 January 2008, Cliff Berry).

193 *Ibid* at para 48. See also *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083.

194 (2008) 47 EHRR 39 (ECtHR).

195 *Ibid* at para 31. See also *N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)* [2005] 2 AC 296 (HL), para 23.

196 *Ibid* at para 43.

authorities can be held responsible”.¹⁹⁷ This indicates, as discussed above, that the “inhuman or degrading treatment” (as required by Art 3 of the ECHR) for which the authorities are responsible is the removal/expulsion, and the responsibility of any other state or non-state actor is irrelevant. This must be correct since, as established at the beginning of this article, deportation cases do not concern the state responsibility of the receiving country. As the joint dissenting opinion in *N v United Kingdom*,¹⁹⁸ therefore, argued, as long as the minimum level of severity is attained, the fact that the medical treatment is unavailable rather than being withheld should not affect the validity of the claim.¹⁹⁹ If this is correct, then it suggests that there is no justification for a high threshold for cases either of inability or unwillingness. The only possible justification would be that the minimum level of severity is reached more easily where the home state has “added to the degradation” by adopting policies that make access to medical treatment more difficult.²⁰⁰

Notwithstanding this lack of clarity, there is recent authority in the United Kingdom upholding a “varying threshold” to the engagement of Art 3, “dependent upon the responsibility of the receiving state for the circumstances complained of”.²⁰¹ This suggests that where an applicant can establish that the receiving state is unwilling to provide treatment to them, it will be much easier to make out a claim for protection under Art 3 of the ECHR or Art 7 of the ICCPR.

Before concluding this section it should be noted that there is one final method whereby removal could implicate the prohibition on inhuman or

197 See *Pretty v United Kingdom* (2002) 35 EHRR 403 (ECtHR), para 52; *N v United Kingdom* (2008) 47 EHRR 39 (ECtHR), para 29.

198 (2008) 47 EHRR 39 (ECtHR).

199 *Ibid* at para 5 (joint dissenting opinion).

200 See the argument of counsel in *RS (Zimbabwe) v Secretary of State for the Home Department* [2008] EWCA Civ 839, para 15.

201 See *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083, para 254, in which the Asylum and Immigration Tribunal cited its earlier decision in *HS (Returning Asylum Seekers) Zimbabwe CG* [2007] UKAIT 00094, which had set out this reasoning. *HS* had also concerned Zimbabwe, but at the time it was decided that there was insufficient evidence that the state was responsible for the socio-economic deprivation occurring in that country. By contrast, in *RN*, the Tribunal stated (at para 255) that the “fresh evidence now before the Tribunal demonstrates that the state is responsible for the displacement of large numbers of people so as to render them homeless and ... the evidence demonstrates also that there has been discriminatory deprivation of access to food aid which, plainly, is a deliberate policy decision of the state acting through its chosen agents”. Although the Court of Appeal had rejected this distinction in *ZT v Secretary of State for the Home Department* [2005] EWCA Civ 1421, paras 14–16, the later decision in *RS (Zimbabwe) v Secretary of State for the Home Department* [2008] EWCA Civ 839, paras 31–35 (Pill LJ) & 39–41 (Arden LJ) suggests that the distinction may be valid. However, the reasoning of the English Court of Appeal is not, with respect, entirely clear on this point.

degrading treatment in the context of medical concerns, although it is conceptually somewhat different from those considered thus far. It is a case involving risk to the mental health of a person (typically a risk of suicide) caused by the decision to expel. In cases where the claimant relies on a lack of adequate psychiatric or other facilities in his or her home country, essentially the same analysis as outlined above would apply.²⁰² However, it is also possible for a claim to be made out based on Art 3/Art 7 where the impact of informing the applicant of a final decision to deport may increase the risk of suicide.²⁰³ In such a case, “[a]n [Art] 3 claim can in principle succeed”,²⁰⁴ although the courts have allowed such claims only in exceptional cases.²⁰⁵ Such a case would remain open in jurisdictions such as Canada and New Zealand, notwithstanding the exclusion of claims based on lack of medical treatment alone, since the availability of treatment in the receiving state is not at issue.²⁰⁶

202 For authority of the European Court of Human Rights on this point, see *Bensaid v United Kingdom* (2001) 33 EHRR 10 (ECtHR), in which the Court held that Art 3 of ECHR is capable of applying in such cases, although the circumstances were not sufficiently exceptional or compelling in that case. Although the English Court of Appeal in *CN (Burundi) v Secretary of State for the Home Department* [2007] EWCA Civ 587, para 25, has acknowledged that the “circumstances are not precisely analogous”, it has noted that “the similarities are more important than the differences”. For recent authority on this issue, see *KN (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 1430; *RA (Sri Lanka) v Secretary of State for the Health Department* [2008] EWCA Civ 1210, para 49.

203 See *J v Secretary of State for the Home Department* [2005] EWCA Civ 629, para 17.

204 *Ibid* at para 29.

205 In *R (on the application of Kurtoli) v Secretary of State for the Home Department* [2003] EWHC 2744 (Admin), para 84, a claim was made out on the basis that “the notification of the decision to remove Mrs K with her mental health problems caused by her experiences in Kosovo and the implementation of that decision would mean ... that [her] medical condition would probably deteriorate so that she would probably or might well succeed in committing suicide”.

206 As the Court noted in *R (on the application of Kurtoli) v Secretary of State for the Home Department* [2003] EWHC 2744 (Admin), para 80, the basis of the Art 3 complaint was “the likely trauma caused to Mrs K and the consequences to her family of her contemplating a move and actually moving abroad from Dover. There is no complaint whatsoever of lack of resources for the claimant outside this country with the result that the reasoning of the majority of the Court of Appeal in *N* is inapplicable to this case.” This distinction was also clearly drawn in the later decision of the English Court of Appeal in *J v Secretary of State for the Home Department* [2005] EWCA Civ 629, in which Dyson LJ noted that in cases involving the risk of suicide, the risk of a violation of Art 3 (and/or Art 8) “must be considered in relation to three stages”. The first stage — “when the Appellant is informed that a final decision has been made to remove him to Sri Lanka” — is “plainly a domestic case”: *ibid* at para 17. Although being described

B *Other deprivations of socio-economic rights under Arts 6 and 7 of the ICCPR*

Although most discussion concerning the application of Art 3/Art 7 to removal has focused on the right to medical treatment, there is an important question as to whether it can apply to other contexts as well, particularly in light of the fact that domestic legislation such as the New Zealand Immigration Bill does not attempt to preclude claims based on socio-economic rights, other than the right to medical treatment. In *N v United Kingdom*²⁰⁷ the European Court of Human Rights observed that although that case, like most of the previous case law, was concerned with the expulsion of a person with an HIV and AIDS-related condition, “the same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialized medical treatment which may not be so readily available in the applicant’s country of origin or which may be available only at substantial cost”.²⁰⁸ The European Court of Human Rights did not, however, discuss the application of those principles to other cases involving socio-economic rights.

Certainly Art 3 of the ECHR has been interpreted so as to apply to other socio-economic contexts in “domestic cases” as alluded to above. For example, in *R (on the application of Limbuela) v Secretary of State for the Home Department*²⁰⁹ the House of Lords found that the United Kingdom’s policy of prohibiting asylum seekers from receiving welfare benefits when their applications were not filed “as soon as reasonably practicable” amounted to “inhuman or degrading treatment” in violation of Art 3 of the ECHR. As Lord Bingham of Cornhill explained, this was because an asylum seeker “with no means and no alternative sources of support, unable to support himself is, by the deliberate action of the state, denied shelter, food, or the most basic necessities of life”.²¹⁰

In *Dulas v Turkey*,²¹¹ the European Court of Human Rights found that the action of the Turkish security forces in burning down the applicant’s home in the course of a security operation amounted to a violation of Art 3 of the ECHR. The Court noted that:²¹²

as a “domestic” case, which implies a lower threshold, it appears that it nonetheless remains difficult to make out a case on this ground.

207 (2008) 47 EHRR 39 (ECtHR).

208 *Ibid* at para 45.

209 [2006] 1 AC 396 (HL).

210 *Ibid* at para 7.

211 (ECtHR, Application No 25801/94, 30 January 2001).

212 *Ibid* at paras 54–55.

The applicant in the present case was aged over 70 at the time of the events. Her home and property were destroyed before her eyes, depriving her of means of shelter and support, and obliging her to leave the village and community, where she had lived all her life. No steps were taken by the authorities to give assistance to her plight. Having regard to the manner in which her home was destroyed and her personal circumstances therefore, the Court finds that the applicant must have been caused suffering of sufficient severity for the acts of the security forces to be categorized as inhuman treatment within the meaning of [Art] 3.

The question is whether the same analysis can be applied in the expulsion context. Further, if it can, is it restricted to cases where the socio-economic deprivation will be caused by intentional action on the part of a state (or a non-state actor whom the state cannot control), or can it apply to more generalized poverty?

In the United Kingdom there is developing jurisprudence on the extent to which Art 3 of the ECHR prohibits the removal of a person in circumstances where he or she will face seriously disadvantaged economic conditions on return, other than a lack of medical treatment. In perhaps the clearest statement of support for such extension, the United Kingdom Asylum and Immigration Tribunal has confirmed that “[i]t is uncontroversial that if as a result of a removal decision a person would be exposed to a real risk of existence below the level of bare minimum subsistence that would cross the threshold of Art 3 harm”.²¹³ Although the word “uncontroversial” might be overstating the case,²¹⁴ claimants have successfully argued that Art 3 prohibits their removal in various situations, including, for example, where the applicant would be returned to “a camp where conditions are described as ‘sub-human’ and [he or she would] face medical conditions described

213 *Mandali v Secretary of State for the Home Department* [2002] UKIAT 0741, para 10. For a recent clear statement on this point, see *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083, para 59, where the Asylum and Immigration Tribunal noted: “We do accept that poor living conditions are capable of raising an issue under article 3 if they reach a minimum level of severity.” See also *Pancenko v Latvia* (ECtHR, Application No 40772/98, 28 October 1999).

214 The case law has sometimes emphasized that such a case will be difficult to establish, although has nonetheless left the possibility open; see, for example, *R (on the application of Doka) v Immigration Appeal Tribunal* [2005] 1 FCR 180, para 27, where the English Queen’s Bench Division questioned whether “Mrs Doka can possibly come up to and clear the high threshold required in [Art] 3” simply on the basis of the destitution that she would face on return to the Sudan. Lindsay J nonetheless quashed the decision of the Immigration Appeal Tribunal to refuse permission to appeal on the basis that this matter had not been adequately considered.

as some of the worst in the world”;²¹⁵ where an applicant was “an amputee who had serious mental problems who would not receive either financial or medical support in the Gambia, and would only have recourse to begging for his support”;²¹⁶ and where a 16-year-old boy returned to Kosovo would be destitute and without any protection.²¹⁷ This indicates a high threshold, but it shows that dire conditions of poverty may well engage Art 3 of the ECHR (and by inference Art 7 of the ICCPR).²¹⁸ It also suggests that this analysis can apply even where the “inhuman or degrading treatment” is constituted by an omission in the receiving state, which is of course consistent with the reasoning in *D v United Kingdom*²¹⁹ and *N v United Kingdom*²²⁰ that the “implementation of the decision to remove” a person to an exceptionally dire situation of socio-economic deprivation may itself amount to inhuman treatment.²²¹ As the United Kingdom *Asylum Policy Instructions* state, “[t]here may be some cases (although any such cases are likely to be rare) where the general conditions in the country — for example, absence of water, food, or basic shelter — are so poor that removal in itself could, in extreme cases, constitute ill treatment under Article 3”.²²²

Interestingly, the English Court of Appeal appears to have upheld this application of Art 3 even in light of the House of Lords’ more restrictive approach to medical cases in *N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)*.²²³ In *GH (Afghanistan) v Secretary of*

215 See *Owen v Secretary of State for the Home Department* [2002] UKIAT 03285, para 27.

216 See *R v Secretary of State for the Home Department, ex p Kebbeh* (QBD, CO/1269/98, 30 April 1999, Hidden J), para 58.

217 See *Korca v Secretary of State for the Home Department* (UKIAT, Appeal No HX-360001-2001, 29 May 2002), para 9. The Immigration Appeal Tribunal also found (at para 9) that a breach of Art 8 (concerning the right to family life) would be breached given the “appellant’s age, the absence of any home or family in Kosovo and the establishment of some degree of home here [in the United Kingdom]”. See also *LM (Democratic Republic of Congo) v Secretary of State for the Home Department* [2008] EWCA Civ 325.

218 The high threshold seems to have been assumed by the Court of Appeal in *AH (Sudan) v Secretary of State for the Home Department* [2007] EWCA Civ 297 and the House of Lords in *AH (Sudan) v Secretary of State for the Home Department* [2008] 1 AC 678 (HL). These were cases concerning “internal relocation” in the context of the Refugee Convention, but it is assumed in these judgments that expulsion may be prevented by Art 3 of the ECHR where the harm feared is severe poverty — the point in these cases is that such a high threshold is *not* required for internal relocation not to be a reasonable option.

219 (1997) 24 EHRR 423 (ECtHR).

220 (2008) 47 EHRR 39 (ECtHR).

221 See *D v United Kingdom* (1997) 24 EHRR 423 (ECtHR), para 53.

222 United Kingdom Border Agency, *Asylum Policy Instructions* (October 2006), 18.

223 [2005] 2 AC 296 (HL).

*State for the Home Department*²²⁴ the Special Adjudicator had found that to return the applicant and his family to Kabul would amount to inhuman or degrading treatment in view of the fact that the family would be “reduced either to living in a tent in a refugee camp or ... in a container with holes knocked in the side to act as windows”.²²⁵ In addition, the applicant would not be likely to obtain work and he would “be competing with others for scarce resources of food and water as well as accommodation”.²²⁶ The Special Adjudicator was particularly concerned about the impact of these conditions on the “five young (some of them very young) children”. The Secretary of State appealed against this decision on the basis that “a disparity in the social, medical, and other forms of assistance in the two states is not by itself sufficient”.²²⁷ In rejecting the appeal, the English Court of Appeal stated:²²⁸

This is not a medical treatment case of the kind considered by the House of Lords in [*N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)*] [2005] 2 AC 296 (HL)] ... For the purposes of this case it was not necessary for the Adjudicator to compare conditions here and in Afghanistan. All that he had to do was to look at conditions there and consider the probable impact on this family, bearing firmly in mind that failed asylum seekers do often have to be returned to a country where conditions are worse than those which they have experienced in the [United Kingdom].

Furthermore, in *ZT v Secretary of State for the Home Department*²²⁹ the English Court of Appeal has also indicated that the fact of a medical condition, such as HIV/AIDS, may give rise to a claim based on Art 3 of the ECHR, not merely on the basis of lack of medical treatment, but also where the particular treatment afforded to an AIDS sufferer on return, “in terms of ostracism, humiliation, or deprivation of basic rights ... [adds] to her existing medical difficulties”.²³⁰ Of course, in such an “exceptional” case the applicant would have a strong claim for refugee status on the basis

224 [2005] EWCA Civ 1603. While this decision pre-dates the European Court of Human Rights decision in *N v United Kingdom* (2008) 47 EHRR 39 (ECtHR), it post-dates the House of Lords decision in *N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)* [2005] 2 AC 296 (HL), which was essentially endorsed by the European Court of Human Rights.

225 *Ibid* at para 5.

226 *Ibid*.

227 *Ibid* at para 19.

228 *Ibid* at para 20.

229 [2005] EWCA Civ 1421.

230 *Ibid* at para 18. See also *RS (Zimbabwe) v Secretary of State for the Home Department* [2008] EWCA Civ 839, para 41, referring to the case where a person suffering an illness

of membership of a particular social group, but it indicates that the United Kingdom courts continue to view other forms of socio-economic deprivation as being relevant to Art 3 claims as well.

The final point to make is that, as is indicated by the reference above in *GH (Afghanistan) v Secretary of State for the Home Department*²³¹ to the applicant's children, a case may meet the Art 3 threshold more easily when it concerns a child.²³² This is entirely consistent with the view of the European Court of Human Rights that assessing whether the "minimum level of severity" has been met is relative — "it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age, and state of health of the victim".²³³ Indeed, the European Commission of Human Rights found a complaint against the United Kingdom's deportation of children to Nigeria admissible under Art 3 of the ECHR on the basis that the children were "ill, isolated, uneducated, and suffering the loss of the facilities they enjoyed in the United Kingdom".²³⁴ In the more recent decision in *Mayeka v Belgium*,²³⁵ the European Court of Human Rights found that Belgium had violated Art 3 of the ECHR in connection with the manner in which it expelled a child, namely, in the fact that it did not ensure that she was accompanied or that she was met on return to Kinshasa in the Congo.

was put into a concentration camp and subjected to forced labour or other degrading treatment.

231 [2005] EWCA Civ 1603.

232 The House of Lords has also recently emphasized the importance of assessing all "foreign" (ie expulsion) cases from the perspective of any children involved. In *EM (Lebanon) v Secretary of State for the Home Department* [2009] 1 All ER 559 (HL) the applicants successfully challenged the removal of a mother and child to Lebanon on the basis that the compulsory removal of the child from the mother's custody (which would occur as a result of discriminatory family law in Lebanon) would violate the right to family life of both the mother and child (protected by Art 8 of the ECHR). Baroness Hale of Richmond particularly emphasized (at para 48) the importance of considering the case "from the child's point of view".

233 See *N v United Kingdom* (2008) 47 EHRR 39 (ECtHR), para 29. For an application of this to the case of a young woman, see *LM (Democratic Republic of Congo) v Secretary of State for the Home Department* [2008] EWCA Civ 325.

234 *Fadele v United Kingdom* (1990) HRC vol 1(1) 15, cited in Blake & Husain, *Immigration, Asylum and Human Rights* (2003) 100. See also *Taspinar v Netherlands* (1984) 8 EHRR 47 (ECtHR), where the Dutch authorities granted a child the right to remain following an admissibility decision under Art 3 of the ECHR.

235 (2008) 46 EHRR 23 (ECtHR).

This approach is also consistent with the views of the Committee on the Rights of the Child, which has emphasized that the *non-refoulement* obligations implied into the CRC apply:²³⁶

... irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.

Although, as noted above, the New Zealand Immigration Bill does not expressly incorporate the *non-refoulement* obligations of the CRC into its domestic complementary protection provisions, it remains the case that New Zealand is bound to comply with the CRC and it would therefore be appropriate for decision-makers to interpret “inhuman or degrading treatment” in view of the particular vulnerability of children.

Conclusion

The analysis in this article has established that while socio-economic rights are clearly implicated and must therefore be considered by states in expulsion decisions, the potential ramifications have been a cause for concern not only for the legislative and executive arms of states, but also for the judiciary. Judicial concerns have been expressed perhaps most eloquently by Sedley LJ in *ZT v Secretary of State for the Home Department*²³⁷ in which his Lordship acknowledged that the questions raised in such cases have not given rise to satisfactory jurisprudential answers.²³⁸ As his Lordship admitted:²³⁹

If HIV were a rare affliction, readily treatable in the [United Kingdom] but not treatable except for the fortunate few in many other countries, the courts would have little hesitation in holding removal of sufferers to such countries to be inhuman treatment contrary to [Art] 3. It is the sheer volume of suffering now reaching these shores that has driven the Home Office,

236 Committee on the Rights of the Child, *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin* (2005) CRC/GC/2005/6, para 27.

237 [2005] EWCA Civ 1421.

238 *Ibid* at para 41.

239 *Ibid*.

the Immigration Appellate Authority, and the courts to find jurisprudential reasons for holding that neither [Art] 3 or [Art] 8 can ordinarily avail HIV sufferers who face removal.

His Lordship went on to note that “[t]he reasoning of the House in [*N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)*]²⁴⁰ accepts, in effect, that the internal logic of the [ECHR] has to give way to the external logic of events when these events are capable of bringing about the collapse of the [ECHR] system ... just as the [ECHR] has grown through its jurisprudence to meet new assaults on human rights, it is also having to retrench in places to avoid being overwhelmed by its own logic”.²⁴¹ His Lordship further stated: “If what results are rules rather than law, that may be an unavoidable price to be paid for the maintenance of the [ECHR] system. One had much rather it were not so.”²⁴²

These extracts provide fascinating insight into judicial reasoning in this area and raise a number of important issues. Clearly, the restrictive reasoning, which at least one prominent justice has admitted is difficult to justify as a matter of principle, is based on floodgates concerns. The problem is that such concerns have traditionally not been thought to constitute legitimate legal argument. As explained above, an apprehension as to present or future ability and resources to fulfil an obligation is not a defence to a violation of the ICCPR (or the ECHR). In *R (on the application of Limbuela) v Secretary of State for the Home Department*²⁴³ — the case discussed above involving a challenge to the United Kingdom’s policies concerning work and welfare entitlements for asylum seekers — the House of Lords acknowledged that the legislation in that case was based on “a legitimate public concern that this country should not make its resources too readily available to [asylum seekers] while their right to remain in this country remains undetermined”,²⁴⁴ but remained firm that “engagement in this political debate forms no part of the judicial function”.²⁴⁵

240 [2005] 2 AC 296 (HL).

241 *ZT v Secretary of State for the Home Department* [2005] EWCA Civ 1421, para 42.

242 *Ibid.* Interestingly, Jonathan Parker LJ explicitly stated (at para 44): “I do not, for my part, share the sentiments expressed by Sedley LJ in paras 41 and 42 above. As I see it, practical considerations are central to the concept of proportionality which is enshrined in the [ECHR]. Accordingly I do not recognize that the [ECHR] has an ‘internal logic’ which on occasion has to give way to the ‘external logic of events’. On the contrary, as it seems to me, the ‘logic’ of the [ECHR] positively embraces practical considerations.”

243 [2006] 1 AC 396 (HL).

244 *Ibid.* at para 13.

245 *Ibid.* at para 14. This can be contrasted with Lord Hope of Craighead’s statement in *N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)* [2005] 2 AC 296 (HL), para 53 that should the House allow the appeal, “[t]his would result in

Furthermore, even if we were to allow consideration of these issues, it is striking that the floodgates concern is not supported by the reality of refugee movements, at least as they impact on developed countries. In its recent report on the treatment of asylum seekers in the United Kingdom, the House of Lords/House of Commons Joint Committee on Human Rights criticized the United Kingdom Government's assertion of the phenomenon of "health tourism", on which it has based a number of policies that restrict access to health care for certain groups of asylum seekers essentially on the basis that providing treatment, such as HIV treatment, would "act as a draw for others to come to the [United Kingdom] for free treatment".²⁴⁶ The Committee found that there was no evidence at all to support the extent of such "health tourism".²⁴⁷ Rather, research suggested that most recent migrants with HIV were unaware of their illness until they had been in the United Kingdom for more than nine months.²⁴⁸ As Bettinson and Jones point out, this makes sense when we consider the lack of access to testing centres in large parts of sub-Saharan Africa and the known stigma that HIV carries in many countries.²⁴⁹ Indeed, the joint dissenting opinion in the European Court of Human Rights decision in *N v United Kingdom*²⁵⁰ cited statistics — notably lacking from the decisions of the majority of the House of Lords in *N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)*²⁵¹ and Sedley LJ in *ZT v Secretary of State for the Home Department*²⁵² — that make it clear that "the so-called 'floodgate' argument is totally misconceived".²⁵³ In the absence of good evidence bearing out the floodgates concern, the House of Lords/House of Commons Joint Committee on Human Rights recommended

a very great and no doubt unquantifiable commitment of resources which it is, to say the least, highly questionable the states parties to the [ECHR] would ever have agreed to". His Lordship then went on to propose (at para 53) that the better solution would be "for states to continue to concentrate their efforts on the steps which are currently being taken, with the assistance of the drugs companies, to make the necessary medical care universally and freely available in the countries of the third world".

246 House of Lords/House of Commons Joint Committee on Human Rights, *The Treatment of Asylum Seekers*, Tenth Report of Session 2006-2007, HL Paper 81-2 (30 March 2007), para 164.

247 Ibid at para 5.

248 Ibid at para 161, citing evidence presented to the Committee by the Terrence Higgins Trust.

249 Bettinson & Jones, "The Future of Claims to Resist Removal by Non-Nationals Suffering from HIV/AIDS" (2007) 28 Liverpool L Rev 183, 192–193.

250 (2008) 47 EHRR 39 (ECtHR).

251 [2005] 2 AC 296 (HL).

252 [2005] EWCA Civ 1421.

253 *N v United Kingdom* (2008) 47 EHRR 39 (ECtHR), para 8 (joint dissenting opinion).

that, in the development of asylum policy, “the Government should proceed on the basis of evidence, rather than assertion”.²⁵⁴

While we can predict such (sometimes misconceived) policy arguments to strongly influence political decisions concerning immigration, including the introduction of limitations and exclusions into domestic legislation, it is of grave concern that such factors have begun to infiltrate judicial reasoning in this area. This article therefore concludes with a call to all decision-makers vested with the task of interpreting international treaty obligations in the *non-refoulement* context to take a principled approach that recognizes the logic of accommodating socio-economic rights violations within the rubric of existing *non-refoulement* obligations. It is arguable that a commitment to the rule of law — not to political concerns — and fidelity to the object and purpose of international treaties is the surest method of militating against any potential “collapse”²⁵⁵ of the international human rights system.

254 House of Lords/House of Commons Joint Committee on Human Rights, above note 246, para 5.

255 *ZT v Secretary of State for the Home Department* [2005] EWCA Civ 1421.