

New Zealand Journal of Public and International Law



VOLUME 11 ■ NUMBER 3 ■ DECEMBER 2013

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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NEW ZEALAND JOURNAL OF
PUBLIC AND INTERNATIONAL LAW

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Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

December 2013

The mode of citation of this journal is: (2013) 11 NZJPIL (page)

The previous issue of this journal is volume 11 number 2, December 2013

ISSN 1176-3930

Printed by City Print Communications, Wellington

Cover photo: Robert Cross, VUW ITS Image Services

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THE APPLICATION OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990 TO NEW ZEALAND STATE ACTORS OVERSEAS

*Ella Watt**

This paper asks three questions: could the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) apply to the acts of New Zealand state actors outside New Zealand? Should it? And to what extent should the Bill of Rights Act have extraterritorial application? It answers the first two questions in the affirmative, based on an analysis of the statutory language, the necessary implication of the Act and case law. The paper argues that the extraterritorial application of the Bill of Rights Act is also desirable. It then suggests that control over an individual by a New Zealand state actor, or a person or body that performs public functions, powers or duties conferred by or pursuant to New Zealand law, is the central requirement for applying the Bill of Rights Act extraterritorially. It also suggests that the Bill of Rights Act's language precludes the application of positive rights abroad. Finally, it suggests that the s 5 mechanism of justified limitations on rights is a tool which provides sufficient flexibility to allow the Bill of Rights Act to apply overseas both effectively and fairly.

I INTRODUCTION

If New Zealand state actors, or persons or bodies in performance of a public function conferred by law, act in a way which affects the lives and rights of individuals overseas, are they required to act consistently with the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act)? Does the Bill of Rights Act apply outside New Zealand? Should it? If the Bill of Rights Act does apply beyond New Zealand's geographical territory, it would potentially be applicable to New Zealand police investigating crimes in the Solomon Islands,¹ the deaths of New Zealand soldiers in Bamiyan

* Law Graduate, Russell McVeagh. The author would like to thank Claudia Geiringer and Rayner Thwaites for their comments.

1 See "NZ police blamed for Solomon trial botch-up" *Stuff* (online ed, Wellington, 8 September 2010).

Province in Afghanistan,² the distribution of foreign aid in Fiji by the Ministry of Foreign Affairs and Trade³ and the alleged complicity of New Zealand Special Air Service officers in the torture of Afghan civilians.⁴

In recent years, high-profile cases in the United Kingdom,⁵ the United States of America⁶ and Canada⁷ have questioned the extraterritorial application of those nations' human rights instruments. These cases have occurred in the context of the United Kingdom's presence in Iraq and the United States' policy of detention of suspected terrorists in Guantánamo Bay, one of whom was a Canadian citizen. Each of these cases found that those states' human rights instruments have some application beyond their borders. The increase in the number of states taking executive action abroad, and the frequency of these acts, means that more and more lives are being affected by state actors from foreign states. States, including New Zealand, must decide where, in what circumstances and to whom to extend the protection of their domestic rights regimes. In other states, this decision has often been made by domestic courts, as individuals who allege violations of their rights by governments increasingly seek remedies under domestic legislation due to the relative lack of enforceability of rights in the international sphere.

In the New Zealand context, the question of how far to extend the application of the Bill of Rights Act overseas is affected by its content and context. The Act's application, either abroad or in New Zealand, is limited by s 3, which restricts its application to New Zealand state actors, or persons or bodies in performance of a public function, power or duty conferred by or pursuant to law. This article therefore considers whether, and to what extent, the Bill of Rights Act operates as a limitation on the acts of New Zealand state officials and others captured by s 3 of the Act. This article first considers any legal or policy limitations on the Bill of Rights Act's application abroad and finds them insufficient to limit its application. The article then investigates other states' approaches. Drawing on that material, it argues that the Bill of Rights Act applies to New Zealand state actors abroad to the extent that those actors have sufficient control over individuals to ensure their rights. However, New Zealand state actors are not responsible for the protection of rights in situations where they have insufficient control or authority over the individual in order to be able to

2 See Kirsty Johnston "Two dead after NZ army attacked in Afghanistan" *Stuff* (online ed, Wellington, 5 August 2012); and Marcus Wild "Three NZ soldiers killed in bomb attack" *Stuff* (online ed, Wellington, 20 August 2012).

3 See "NZ boosts Fiji flood aid to \$1.25m" *Stuff* (online ed, Wellington, 6 April 2012).

4 See Jon Stephenson "Kiwi troops in 'war crimes' row" *Stuff* (online ed, Wellington, 2 August 2009).

5 For example *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153.

6 For example *Boumediene v Bush* 553 US 723 (2008).

7 For example *Canada (Justice) v Khadr* 2008 SCC 28, [2008] 2 SCR 125; and *Canada (Prime Minister) v Khadr* 2010 SCC 3, [2010] 1 SCR 44.

do so. This distinction is present in other states' interpretation of their domestic human rights documents, in the International Court of Justice's interpretation of the International Covenant on Civil and Political Rights (the ICCPR)⁸ and in the statutory language of the Bill of Rights Act itself.

This article will not consider the extraterritorial application of rights affirmed in the International Covenant on Economic, Social and Cultural Rights (which are not guaranteed in the Bill of Rights Act) nor, in any detail, the application of civil and political rights during wartime, though both of these are significant and important areas of study in their own right.

Ultimately, the article suggests that, due to the wording, structure and context of the Bill of Rights Act, New Zealand is particularly well placed to develop a clear, principled approach to the Act's extraterritorial application. As such, New Zealand courts ought to engage fully with this issue when it arises.

II APPLICATION OF HUMAN RIGHTS LEGISLATION OVERSEAS

The extraterritorial application of human rights legislation has recently been considered in many jurisdictions. This section first sets out broadly what is meant by the phrase "extraterritorial application" in a discussion of domestic human rights instruments. It then undertakes a consideration of policy and legal arguments often made to oppose or constrain the application of human rights legislation abroad. It concludes that these arguments do not constitute a barrier to the extraterritorial application of the Bill of Rights Act. In particular, because the Bill of Rights Act only operates as a constraint on the actions of New Zealand state actors, or persons or bodies performing a public function conferred by New Zealand law, it has no effect on the jurisdiction or action of any foreign state.

A How Human Rights Legislation Can Apply Overseas

The application of a human rights document to a particular person requires that a state owes a legal obligation to that individual to protect his or her rights.⁹ The extraterritorial application of human rights regimes can be defined as the existence of a legal obligation to respect rights despite the fact that:¹⁰

... at the moment of the alleged violation of his or her human rights the individual concerned is not physically located in the territory of the state ... a geographical area over which the state has sovereignty or title.

8 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR].

9 Marko Milanovic *Extraterritorial Application of Human Rights Treaties* (Oxford University Press, Oxford, 2011) at 8.

10 Milanovic, above n 9, at 7.

The extraterritorial effects of the Bill of Rights Act may include limitations on the acts of state actors abroad, but may also include the effects of a policy decision in an area such as immigration that is made in New Zealand but has an effect on individuals abroad.¹¹ The extraterritorial effects of acts of the New Zealand Government could be felt by either New Zealand nationals or non-New Zealand nationals abroad.

Issues which have been considered in the international jurisprudence in relation to the extraterritorial application of other human rights instruments include the detention and killing of civilians by British forces in Iraq,¹² the detention of suspected terrorists in Guantánamo Bay, Cuba,¹³ the bombing of the Serbian national television station's network tower by NATO forces,¹⁴ the interrogation of a murder suspect in the United States by a Canadian official¹⁵ and the death due to heatstroke of a British soldier in Iraq.¹⁶ Policies such as extraordinary rendition also raise issues of the extraterritoriality of human rights instruments.

In the New Zealand context, examples of where the issue is most likely to arise include the acts of members of the New Zealand police force investigating New Zealand crimes overseas or operating in the Pacific, the implementation of foreign aid programmes by the Ministry of Foreign Affairs and Trade, the granting or refusal of visas by New Zealand officials and New Zealand Defence Force operations overseas. The extraterritorial application of the Bill of Rights Act would require these state actors, among others, to comply with their human rights obligations under the Act when their acts affect individuals outside New Zealand.

The application of the Bill of Rights Act is determined by s 3, which states that the Act applies:

... only to acts done –

- (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or
- (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

This article will use the term "state actors" to refer to all those covered by s 3 of the Bill of Rights Act (including those non-state persons or bodies covered by s 3(b)). There are no express territorial jurisdictional limits on the application of the Act. Instead, the Bill of Rights Act's

11 Milanovic, above n 9, at 8.

12 *R (Al-Skeini) v Secretary of State for Defence*, above n 5.

13 *Canada (Justice) v Khadr* above n 7; and *Canada (Prime Minister) v Khadr*, above n 7.

14 *Banković v Belgium* (52207/99) Grand Chamber, ECHR 12 December 2001.

15 *R v Cook* (1998) 164 DLR (4th) 1 (SCC).

16 *R (on the application of Smith) v Secretary of State for Defence* [2010] UKSC 29, [2011] 1 AC 1.

application is limited to the acts of state actors as so defined. On its face, nothing precludes s 3 from applying to acts done overseas by branches of the Government of New Zealand, or by persons or bodies in the performance of public functions. Nevertheless, issues of domestic and international legality, as well as policy, come into play in determining the scope of the Bill of Rights Act's possible application outside New Zealand.

B Legal Issues

On authority from the Constitution Act 1986, the New Zealand Parliament has the "full power to make laws".¹⁷ This includes the power to make laws with extraterritorial effect. However, when statutes are interpreted, Parliament is presumed to be concerned with "such persons or things as are within its proper jurisdiction".¹⁸ Overseas acts are generally considered to be beyond the jurisdiction of the New Zealand courts because of the presumption that New Zealand statutes only apply within New Zealand territory. Generally, the necessary implication of the statute, or express statutory language asserting extraterritorial application, will be required to rebut the presumption.¹⁹ This article will argue that both the statutory language of the Bill of Rights Act and its necessary implication require New Zealand state actors to act consistently with the Bill of Rights Act when acting abroad when they have sufficient control over an individual to do so.

As a matter of international law, the New Zealand Parliament has the ability to legislate for its nationals, no matter where they are geographically located.²⁰ This is because legislative jurisdiction can exist abroad without the consent of the territorial state, as can judicial jurisdiction over nationals.²¹ At international law, three types of jurisdiction are recognised: jurisdiction to prescribe (legislative jurisdiction), jurisdiction to enforce (executive jurisdiction) and jurisdiction to adjudicate (judicial jurisdiction).²² Jurisdiction within national territory is considered the "quintessence of sovereignty",²³ and comprises all three types of jurisdiction. Acting abroad, a state cannot exercise its enforcement or judicial jurisdiction on the territory of another state without that state's consent.²⁴ However, no such limitations exist on prescriptive jurisdiction, which may be exercised extraterritorially at any time, and without the permission of the foreign state.²⁵ The application of

17 Constitution Act 1986, s 15(1).

18 *Commissioner of Inland Revenue v Associated Motorists Petrol Co Ltd* [1971] NZLR 660 (PC) at 665.

19 *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 at [36] and [45].

20 Milanovic, above n 9, at 10.

21 Antonio Cassese *International Law* (2nd ed, Oxford University Press, Oxford, 2005) at 49.

22 Cassese, above n 21, at 49.

23 Cassese, above n 21, at 49.

24 Cassese, above n 21, at 49.

25 Cassese, above n 21, at 49.

the Bill of Rights Act overseas would only require the exercise of New Zealand's legislative jurisdiction as both the enforcement of the statute and the judicial decision-making would occur within New Zealand's territory.

Similar to the Bill of Rights Act in New Zealand, the domestic human rights documents of Canada, the United Kingdom and the United States, among others, do not include express provisions on extraterritoriality. This may be because little thought was given to the matter when the documents were written. The rules of extraterritorial application of domestic human rights instruments have generally been developed by domestic courts,²⁶ and the courts have not been overly concerned by the general presumption against the extraterritorial application of statutes. In Canada, for example, the Canadian Charter of Rights and Freedoms (the Canadian Charter)²⁷ can apply extraterritorially in some circumstances,²⁸ despite a presumption of territoriality of legislation.²⁹ The Canadian Parliament's capacity to pass extraterritorial human rights legislation is considered to be limited by "the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations, and by the limits of international law",³⁰ rather than by a presumption against extraterritoriality. New Zealand's courts should not be limited by a presumption of territoriality in considering the Bill of Rights Act's extraterritorial application.

C Policy Issues

The primary reasons cited by other domestic jurisdictions for refusing to apply their domestic bills of rights beyond their borders are comity and sovereign equality, as adverted to above. Enforceability is another fundamental concern of domestic courts.

Comity has been expressed as "the rules observed by states in their mutual relations out of politeness, convenience and good will, rather than any strict legal obligations".³¹ Out of respect for other equally sovereign nation states, states generally do not extend their legislative powers into other states' territory, despite their ability at international law to do so. Similarly, despite their adjudicative jurisdiction over their nationals, states will often allow their nationals to be subject to the domestic law of a foreign state.

26 See Chimène I Keitner "Rights Beyond Borders" (2011) 36 Yale J Int L 55 at 59.

27 Canadian Charter of Rights and Freedoms, pt I of the Constitution Act 1982 (Canada) being Schedule B to the Canada Act 1982 (UK) RSC 1982 c 11 [the Canadian Charter].

28 See *Canada (Justice) v Khadr*, above n 7 at 31.

29 See *Re Farm Products Marketing Act* [1957] SCR 198 at [165].

30 *R v Hape* 2007 SCC 26, [2007] 2 SCR 292 at [68].

31 *R v Hape*, above n 30, at [47].

This is also for reasons of enforceability: although a state may have jurisdiction to legislate for any part of the globe, any executive jurisdiction requires the consent of the territorial authority.³² As such, any ability of a state to enforce its human rights obligations, even if they apply abroad, is restricted by the state's ability to remove the individual to its territory in order to enforce, or adjudicate on, the consequences of the legislation.

In New Zealand, the problems of comity, foreign state sovereignty and enforceability can readily be avoided. This is because, under s 3 of the Bill of Rights Act, only New Zealand state actors are required to comply with the Bill of Rights Act. As such, in any action to assert the rights contained in the Bill of Rights Act, New Zealand courts would only enforce such rights against New Zealand state actors, not against foreign state nationals, who do not fall within the ambit of s 3. No jurisdiction is exercised over foreign nationals except to the extent that they seek to assert that their rights under the Bill of Rights Act have been affected and seek to lay a claim in a New Zealand court, thereby accepting jurisdiction. Further, any enforcement jurisdiction exercised by New Zealand courts would be exercised on New Zealand territory following the return of the individual concerned, or under the extant jurisdiction of a New Zealand military tribunal abroad. As such, neither principles of New Zealand law, nor principles of comity and sovereignty, are likely to prevent the application of the Bill of Rights Act to New Zealand state actors.

III APPROACHES TO THE EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS LEGISLATION

There is only one New Zealand case which deals directly with the extraterritorial application of the Bill of Rights Act. For that reason, in order to further inform the discussion and seek a model for the development of the New Zealand jurisprudence, this section will also consider the regimes which have been developed in Canada and the United Kingdom. Those states' jurisprudence is often used as a comparator for New Zealand in the human rights context due to the similarity of their human rights instruments. This section will also describe the current position at international law in order to provide a further means of understanding the possible extraterritorial scope of rights.

A Current New Zealand Case Law

New Zealand authorities shed only limited light on the issue of whether the Bill of Rights Act applies extraterritorially. There is only one case which has directly considered the issue, *R v Matthews*.³³ It is also worth noting for completeness two cases which mention the possibility of the

32 *The Case of the SS Lotus (France v Turkey)* (1927) PCIJ (series A) No 10.

33 *R v Matthews* (1994) 11 CRNZ 564 (HC).

application of the Bill of Rights Act both at the border and beyond the border in an immigration context. However, both simply state that the issue remains unresolved.³⁴

R v Matthews dealt with the arrest and interview of a New Zealander, Mr Matthews, overseas. He was accused of committing a crime in New Zealand and was subsequently arrested in Australia by Australian police. A New Zealand police officer participated in the arrest as an "observer", but played an active role in the interview.³⁵ Tipping J, in the High Court, discussed the possibility of the Bill of Rights Act's extraterritorial application in some detail, although his decision ultimately rested on the interpretation of a specific provision of the Bill of Rights Act.

In his discussion on extraterritoriality, Tipping J came to a series of conclusions. First and uncontroversially he held that officials of overseas governments were not subject to s 3, so the Australian police officers did not breach the Bill of Rights Act.³⁶ Secondly, he appeared to imply that New Zealand police officers acting abroad were covered by s 3, as they were "although overseas, still acting on behalf of the executive branch of the Government of New Zealand".³⁷ Tipping J seems, therefore, to have considered that some degree of extraterritorial application of the Bill of Rights Act was possible. In holding that the fact that a police officer is representing the Government of New Zealand does not "stop at the coastline" he appeared to reject an understanding of s 3 that is limited to New Zealand territory.³⁸

His ultimate conclusion, however, was that the Bill of Rights Act did not apply in Mr Matthews' case. The decision rested on the meaning of s 23 of the Bill of Rights Act, which provides for the rights of those arrested and detained. Tipping J stated that the expression in s 23(1) "anyone who is arrested or detained under any enactment" was territorially limited to New Zealand.³⁹ As such, *R v Matthews* is inconclusive as to the extent to which the Bill of Rights Act applies outside New Zealand. The case certainly does not expressly "exclude the possibility of BORA applying to police actions outside New Zealand" in respect of other rights.⁴⁰ Ultimately, though, the extent of the extraterritorial application that is favoured is unclear.

34 *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [87]; and *Jian v Residence Review Board* CIV-2005-485-1600 HC Wellington, 3 Aug 2006 at [26].

35 *R v Matthews*, above n 33, at 565.

36 At 567.

37 At 568.

38 At 568.

39 At 569.

40 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis NZ, Wellington, 2005) at 116.

As such, the New Zealand case law provides some support for the possibility of the extraterritorial application of the Bill of Rights Act. However, it shows a general reluctance to engage directly with the issue and gives no particular guidance as to the preferred approach. This article therefore turns to consider the comparative jurisprudence on the issue.

B Canada

In Canada there is a presumption against the application of the Canadian Charter outside Canadian territory. The current authority for this proposition is *R v Hape*.⁴¹ In that case, the Supreme Court of Canada considered whether the Charter applied to a search of Hape's offices in the Turks and Caicos Islands conducted jointly by the Canadian Mounted Police and the local authorities. The Court held that, in deference to the principles of comity and foreign state sovereignty, the application of the Charter was primarily limited to Canada. The decision was based on the belief that it was contrary to international law to apply the Charter outside Canada. However, the decision has been criticised as misunderstanding the difference between legislative, judicial and executive jurisdiction and, as such, for unnecessary deference to foreign state sovereignty.⁴² The Court also held that there are two instances in which the Charter may nevertheless apply beyond Canada's borders: when the state in which the Charter is to be applied either expressly consents to its application or is itself acting in violation of international law.⁴³

The rule in *Hape* was developed in the decision of *Amnesty International Canada v Canada*, in which the Federal Court of Appeal considered the application of the Charter to detention camps in Afghanistan.⁴⁴ The Court held that a violation of international law by the foreign state on its own territory is required but not sufficient for the Charter to apply on that territory. Additionally, the Canadian authorities must have "effective control" over the foreign territory and people.⁴⁵ This was held not to be the case in the Kandahar Airfield context, as control was shared with international forces.

Canadian case law on the extraterritorial application of the Charter was further developed in two cases concerning Omar Khadr, a Canadian citizen of Pakistani descent detained at Guantánamo Bay Naval Base, Cuba.⁴⁶ Khadr was subject to sleep deprivation to make him less resistant to interrogation. In the first of the two cases, the Supreme Court of Canada held that the United States'

41 *R v Hape*, above n 30.

42 John Currie "Khadr's Twist on Hape: Tortured Determinations of the Extraterritorial Reach of the Canadian Charter" (2008) 46 Can YB Int Law 307 at 317.

43 *R v Hape*, above n 30, at [69].

44 *Amnesty International Canada v Canada* [2009] 4 FCR 129.

45 At [25].

46 *Canada (Justice) v Khadr*, above n 7; and *Canada (Prime Minister) v Khadr*, above n 7.

holding of Khadr was in violation of international law and ordered the Canadian Government to provide Khadr with the transcripts of interrogations, which they did.⁴⁷ In the second case – a judicial review of the decision of the Canadian Government not to request Khadr's repatriation to Canada – the Court held that the Charter applied (because the regime of detention at Guantánamo Bay was in breach of international law and, as such, any complicity in it was a breach of Canada's international human rights obligations) and that Khadr was owed a remedy. The remedy given by the Court was a declaration that Khadr's rights had been violated, leaving the choice of action to the executive's discretion.⁴⁸ The Canadian Supreme Court in the Khadr cases confirmed the rule in *Hape* that the application of the Canadian Charter is limited to Canadian territory unless the state in which the Charter is to be applied either expressly consents to its application or is acting in violation of international law in a way which jeopardises the liberty of a Canadian citizen.⁴⁹ This article does not suggest that the Canadian model be adopted in New Zealand, as it has been criticised as ambiguous, circuitous and perplexing.⁵⁰

C The United Kingdom

The model adopted in the United Kingdom requires control over territory before the rights contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention)⁵¹ are applicable. *Al-Skeini v Secretary of State for Defence* is currently the leading United Kingdom authority on the extraterritorial application of the Human Rights Act 1998 (UK).⁵² However, an effective overruling in the European Court of Human Rights means that it is likely to be overturned.

The House of Lords in *Al-Skeini v Secretary of State for Defence* considered whether United Kingdom human rights protections applied to Iraqi civilians killed in British-occupied Basra. The House of Lords was clearly attentive to concerns of comity, stating that:⁵³

... the extra-territorial jurisdiction of one state is *pro tanto* a diminution or invasion of the territorial jurisdiction of another state, which must lead one to the conclusion that such extraterritorial jurisdiction should be closely defined.

47 *Canada (Justice) v Khadr*, above n 7, at [42].

48 *Canada (Prime Minister) v Khadr*, above n 7, at [2].

49 *Canada (Justice) v Khadr*, above n 7, at [17]–[26]; and *Canada (Prime Minister) v Khadr*, above n 7, at [14]–[18].

50 Keitner, above n 26, at 86.

51 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

52 *R (Al-Skeini) v Secretary of State for Defence*, above n 5.

53 At [97].

Article 1 of the European Convention requires that "High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms" contained in the document. The House of Lords interpreted this article to bind the United Kingdom to apply the protections in the European Convention to all those within a geographical territory over which the United Kingdom exercised control. It stated that control could be deemed to be exercised extraterritorially, and outside the *espace juridique*⁵⁴ of Europe, only if the United Kingdom had the authority and power to provide "the whole package of rights" contained in the European Convention, as rights could not be "divided and tailored".⁵⁵ However, the European Convention would apply in embassies or military bases, which were effectively deemed to be extensions of national territory.⁵⁶

The *Al-Skeini* plaintiffs then took their case to the European Court of Human Rights. Prior to the decision of the European Court in *Al-Skeini v United Kingdom*,⁵⁷ the House of Lords was replaced by the United Kingdom Supreme Court, which was called on to consider *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)*.⁵⁸ In that case, the Supreme Court held that the European Convention did not apply to British soldiers abroad, outside of British military bases.⁵⁹ However, the Supreme Court later overruled that decision in *Smith v Ministry of Defence* due to its conflict with the intervening decision of the European Court of Human Rights in *Al-Skeini v United Kingdom*.⁶⁰

Indeed, the approach to extraterritoriality in general is likely to change following the decision of the Grand Chamber in *Al-Skeini*, as the Supreme Court is obliged to "take into account" decisions of the European Court of Human Rights.⁶¹ In *Al-Skeini*, the Grand Chamber held, based on earlier jurisprudence, that jurisdiction in art 1 of the European Convention is primarily territorial.⁶² However, the Court also held that in "exceptional cases" the European Convention would apply extraterritorially due to state agent authority and control.⁶³ Unlike the House of Lords in *Al-Skeini*, the Strasbourg Court held that rights could be divided and tailored in particular circumstances.

54 Legal space.

55 At [79].

56 At [97].

57 *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 (Grand Chamber, ECHR).

58 *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2010] UKSC 29, [2011] 1 AC 1.

59 At [60].

60 *Smith v Ministry of Defence* [2013] UKSC 41 at [45].

61 Human Rights Act 1998 (UK), s 2(1).

62 *Al-Skeini v United Kingdom*, above n 57, at [131].

63 At [131].

These circumstances included, firstly, when effective control is exercised over a territory through the presence of state agents. Secondly, the Court recognised that the European Convention may apply due to effective control by a state over an area outside its national territory, through military presence or through control over subordinated local institutions.⁶⁴ Thirdly, and importantly, the Court held that the application of the European Convention could result from control being exercised over an individual through the acts of diplomatic agents, the exercise of public powers normally exercised by a local government with that local government's consent, invitation or acquiescence, or through an exertion of "physical power and control".⁶⁵ On the facts of the case it held that United Kingdom forces were exercising sufficient control over the individuals concerned (through the exercise of public powers in Basra at the time) that those who were killed were within the jurisdiction of the United Kingdom.

It is the third form of control discussed by the European Court of Human Rights – control over an individual – which this article (in Part IV) will adopt as a favourable model for the extraterritorial application of the Bill of Rights Act. However, it will reject some elements of the European Court's approach, suggesting that under the Bill of Rights Act, unlike under the European Convention, jurisdiction is not primarily territorial. Instead, it is dependent on the application of s 3 of the Bill of Rights Act, and therefore applies to any act of a New Zealand state actor.

D International Jurisprudence

The international jurisprudence is informative, although it considers jurisdiction differently, as the function of the concept in this context is to delineate the scope of New Zealand's international obligations. Due to the presumption of consistency with international law,⁶⁶ the extraterritorial scope of the ICCPR may influence New Zealand courts' decisions as to the appropriate approach to be taken in New Zealand. Determining whether rights under the ICCPR are enforceable against a state acting outside of its territory requires consideration of who, outside of the state territory, is subject to the jurisdiction of a state under art 2(1) of the ICCPR, which requires each state party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."

Jurisdiction under the ICCPR is dependent on state responsibility at international law for the violating act, according to the International Court of Justice in *Armed activities in the territory of the Congo (Democratic Republic of Congo v Uganda)*.⁶⁷ The International Court of Justice held that

⁶⁴ At [138].

⁶⁵ At [134]–[136].

⁶⁶ See for example *Zaoui v Attorney General (No 2)* [2005] NZSC 39, [2006] 1 NZLR 289 at [90] per Keith J at fn 68.

⁶⁷ *Armed activities in the territory of the Congo (Democratic Republic of Congo v Uganda) (Merits)* [2005] ICJ Rep 168.

when Uganda was not acting as an occupying power, it was responsible only for "all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law."⁶⁸ Although this is an unclear statement as to the precise limits and sources of rights,⁶⁹ it is nevertheless informative. It clearly implies limits to the obligations owed by state actors abroad, except when acting as an occupying power.

According to the United Nations Human Rights Committee in its *General Comment 31*, an individual is subject to the jurisdiction of a state party, and therefore the ICCPR applies, when that individual is "within the power or effective control of that State Party".⁷⁰ As such, extraterritorial jurisdiction depends on the effect of the state's action on the individual. Authority or control over a person is enough to require the state to refrain from breaching the individual's rights.⁷¹

In his commentary on the ICCPR, Manfred Nowak explains that the meaning of the obligation to respect rights is that "States parties must *refrain* from restricting the exercise of these rights".⁷² In contrast, he explains that the obligation to ensure rights is a positive duty, requiring states to "take steps to give effect to the rights".⁷³ In considering the scope of the positive obligation, Noam Lubell's analysis of the travaux préparatoires to the ICCPR suggests that states "wished to avoid the risk that the Covenant would create positive duties outside the scope of a state's authority and ability to execute such obligations."⁷⁴

Therefore, the extraterritorial application of the ICCPR requires negative rights to be upheld by state actors abroad, while the requirement to promote positive rights is less clear. The adoption of a model consistent with the jurisprudence of the International Court of Justice in New Zealand will ensure that New Zealand fulfils its international obligations, as well as the Bill of Rights Act's purpose of affirmation of commitment to the ICCPR.

68 At [180].

69 See Michał Gondek *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, 2009) at 210.

70 United Nations Human Rights Committee *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* CCPR/C/21/Rev1/Add13 (2004) at [10].

71 Gondek, above n 69, at 211.

72 Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, NP Engel, Germany, 2005) at 37.

73 At 38.

74 Noam Lubell *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press, Oxford, 2010) at 201.

IV A MODEL FOR NEW ZEALAND

Having considered the different models used in comparator jurisdictions and the international obligations imposed on New Zealand by the ICCPR, this article now advances its proposed model for the application of the Bill of Rights Act to New Zealand state actors abroad. As has already been noted, it suggests a model based on control of an individual. The Bill of Rights Act's application, either in New Zealand or abroad, is limited to actors who fall within s 3 of the Bill of Rights Act. This means that concerns about comity and sovereignty which may otherwise restrict the extraterritorial application of a domestic human rights document are easily avoided. It also means that the model of control over an individual best fits the Bill of Rights Act framework, as well as being the clearest and most principled approach.

This article suggests that it is clear that s 3, which dictates who the Bill of Rights Act "applies to", allows for the Act's extraterritorial application. Further, many rights apply to "everyone" or "every person", and are not restricted by geographical location. Moreover, the presumption of consistency with international law requires the Act to apply beyond New Zealand's borders, at least to a certain extent. It is not correct to read s 3 of the Bill of Rights Act restrictively and limit the application of the Bill of Rights Act rights to New Zealand territory. Rather, a purposive approach must be adopted, allowing the application of the Bill of Rights Act overseas and requiring New Zealand state officials to act consistently with their Bill of Rights Act obligations when acting abroad.

Once it is accepted that the Bill of Rights Act applies to the actions of New Zealand state actors overseas, this article advocates for a model which treats control over an individual as determinative of whether that individual has rights and is owed obligations under the Bill of Rights Act. This section will outline the preferred position and will show how the position is supported by a reading of the Bill of Rights itself.

A The Preferred Model: Authority or Control over an Individual

This article argues that the Bill of Rights Act creates a legal obligation for state actors to respect the human rights of all individuals over whom they have authority or control, in situations where a breach of rights is causally linked to an act or omission of a s 3 actor. This is because the Bill of Rights Act generally grants the rights contained within it to "everyone" or "every person" affected by "acts done by the legislative, executive, or judicial branches of the Government of New Zealand" or acts of individuals or bodies when exercising public powers, duties or functions conferred by law.⁷⁵ Thus, New Zealand state responsibility can exist due to authority or control over an individual exercised by a New Zealand state actor. However, this does not mean that all the rights contained in the Bill of Rights Act are required to be ensured by New Zealand state actors abroad,

⁷⁵ New Zealand Bill of Rights Act 1990, s 3.

regardless of circumstances and the content of the right. Notions of control or authority over an individual also act as limitations on responsibility for breaches of rights. If New Zealand state actors have insufficient authority or control over an individual to enforce certain rights with respect to that individual, New Zealand state actors will not be responsible for enforcing those rights.

The article suggests, first, that the Bill of Rights Act does not begin from a presumption of territoriality, as has been held to be the case with the European Convention.⁷⁶ Instead, the Bill of Rights Act is brought into play through its application to the acts of New Zealand state actors or those performing public duties, functions or powers derived from s 3. When applied overseas, the Bill of Rights Act applies when those s 3 actors have sufficient authority or control over individuals that acts or omissions of those actors cause breaches of their rights. When individuals' rights are vulnerable to breach by New Zealand state actors, the state actors will be required to respect those rights.

The decision of the European Court of Human Rights in *Al-Skeini v United Kingdom* provided two different models for the extraterritorial application of human rights documents based on control – a territorial model and a personal model.⁷⁷ This article supports the adoption of the personal model of control as a model for New Zealand. However, it notes that the European Court of Human Rights was constrained by the presumption of territoriality of the European Convention, arising from its former jurisprudence, which is not applicable to the Bill of Rights Act.⁷⁸ Further, that earlier jurisprudence was criticised as inconsistent and unclear, and led to Judge Bonello, in his separate but concurring judgment in *Al-Skeini*, to make what he termed a guileless plea for a "return to the drawing board".⁷⁹ The European Court of Human Rights also found that killing was not a form of control, although detention and the exercise of public powers were.⁸⁰

This author rejects a conception of control or authority which is based on arbitrary notions of territoriality or terminology and, instead, favours an analytical approach to determining whether in fact a New Zealand state actor had control over persons. This is the appropriate means of determining whether New Zealand state actors caused the alleged breach of rights. The lack of prior jurisprudence means that New Zealand can begin with the fundamentals and develop a principled and fair approach to the Bill of Rights Act's application abroad. New Zealand is in a position which would allow it to adopt a simple control and causation test, which is appropriate under the Bill of Rights Act. The attribution of an act to a New Zealand state actor ought to be determined according

76 *Al-Skeini v United Kingdom*, above n 57, at [131].

77 *Al-Skeini v United Kingdom*, above n 57.

78 At [137].

79 At [8] per Judge Bonello.

80 At [135].

to a causation analysis. Where New Zealand state actors had sufficient control or authority over an individual that their actions caused a breach of that individual's rights, they will be responsible for a breach of the Bill of Rights Act. This is consistent with the wording of s 3, which hinges on "acts done" by New Zealand state actors.

The language of the Bill of Rights Act supports the suggestion that New Zealand state actors are required to *respect* rights abroad when they have sufficient control to do so, but are not required to *ensure* rights when they have insufficient control or authority over the individual on foreign territory to be able to do so. The rights in the Bill of Rights Act generally apply to "everyone",⁸¹ or "every person".⁸² However, some rights, such as electoral rights, are limited to New Zealand citizens.⁸³ Other rights, such as the rights of minorities, are territorially limited to those "present in New Zealand".⁸⁴ This reveals consistency with the control model. New Zealand state actors are required to *respect* everyone's rights when they have control or authority over them. This is the case, for example, in relation to the rights to life and freedom from cruel and unusual punishment. In contrast, New Zealand state actors are not required to *ensure* rights when they have insufficient control or authority over the individual to be able to do so, and when they have no responsibility for the particular rights, both as a practical matter, and as a matter of comity and respect for sovereign equality. This would be the case, for example, in relation to electoral rights and the rights of minorities.

The following sections will expand on the model of control or authority over an individual and show, in detail, how the statutory language of the Bill of Rights Act supports the application of such a model. Section B below will show that the language of the Bill of Rights Act supports the application of rights abroad when state actors have sufficient control to respect those rights. Sections C and D will then demonstrate that the limitations on application abroad are also consistent with the requirement of control for the enforcement of rights. Although New Zealand state actors will generally be required to comply with their obligations under the Bill of Rights Act, they will not be required to enforce or uphold rights for which they are not responsible, and which would require significant interference with foreign state sovereignty.

B The Language of the Bill of Rights Act Supports an Authority or Control Model

As noted above, there are no express territorial limits on the application of the Bill of Rights Act. Its application is instead limited to a class of people, namely those people whose rights are

81 New Zealand Bill of Rights Act 1990, ss 9, 11, 13, 14, 16, 17, 19 and 21–25.

82 New Zealand Bill of Rights Act 1990, ss 10, 15 and 27.

83 New Zealand Bill of Rights Act 1990, ss 12 and 18(2).

84 New Zealand Bill of Rights Act 1990, s 20.

affected by the acts of New Zealand state actors. On its face, nothing precludes the Bill of Rights Act, through s 3, from applying to acts done overseas by branches of the Government of New Zealand, or persons or bodies in the performance of public functions conferred by law. Section 3 is similar to the application section of the Human Rights Act (UK), which limits its application to "public authorities" in the United Kingdom.⁸⁵ However, the analysis of the United Kingdom courts with respect to the extent of application of the Human Rights Act (UK) is altered by the European context in which it operates. As such, it is of limited guidance in the interpretation of s 3 of the Bill of Rights Act.

The application section of the Canadian Charter is similar to s 3 of the Bill of Rights Act.⁸⁶ As discussed above, in *R v Hape*, a leading authority on the Charter's extraterritorial application, the Supreme Court of Canada ruled that the actions of members of the Canadian executive were not subject to the Charter when acting overseas except in the very exceptional circumstances of the receipt of express permission from the other state for the Charter to apply in its territory, or a breach of international obligations by that state. This is because if an action occurs abroad it "falls outside the authority of Parliament and the provincial legislatures".⁸⁷ The Court based its conclusion primarily on the wording of the application section as well as the international customary prohibition on the enforcement of statutes outside a state's territory and its concerns about comity and the sovereignty of states.⁸⁸

Even if the limitations derived from sovereignty and comity in *Hape* were accepted, the decision in *Hape* can be distinguished on the basis of statutory language. This is because, in New Zealand, there is no requirement such as that in s 32(1)(a) of the Canadian Charter for the matter to be "within the authority" of Parliament. Instead, s 3 requires that there is an act done by the legislative, executive or judicial branches of government, or by a person or body exercising a public function, power or duty conferred by law. On the words of the statute, so long as an act is done by a New Zealand state actor, the Bill of Rights Act can apply.

Further, it is worth noting that on its face, there is nothing limiting s 3(b) (applying to the act of persons or bodies exercising public functions conferred or imposed by or pursuant to law) to the acts of New Zealand state actors. However, it would be absurd to suggest that the Bill of Rights Act was intended to control the exercise of power by the governments of other states, as such attempted control would be an excessive infringement on the sovereignty of the other state, and hence contrary

85 Human Rights Act 1998 (UK), s 6.

86 See Canadian Charter, s 32(1).

87 *R v Hape*, above n 30, at [69].

88 At [40] and [65].

to international law.⁸⁹ Moreover, it would be practically impossible, unenforceable and unworkable. For these reasons, this article suggests, as Tipping J suggested in the only case to specifically consider the issue, *R v Matthews*, that "the expression ... 'by or pursuant to law' [in s 3(b)] must mean by or pursuant to the laws of New Zealand." ⁹⁰

In *R v Matthews*, Tipping J considered the scope of s 3, though his analysis is not entirely clear. As noted above, he stated that even when acting overseas a "New Zealand police officer is ... still acting on behalf of the executive branch of the Government of New Zealand", suggesting that the Bill of Rights Act should apply.⁹¹ His analysis appears to imply that a proper understanding of s 3 does not allow the understanding of the term "acts done" to be limited to New Zealand. Instead, he considered that New Zealand state actors' roles as representatives of the New Zealand Government did not "stop at the coastline of New Zealand".⁹² He considered that the effect of s 3 was not necessarily to limit the application of the Bill of Rights Act to New Zealand, but that certainly:⁹³

... when the Australian Federal officers were executing the provisional arrest warrant and the search warrant they were in no way subject to the New Zealand Bill of Rights Act even though the purpose of the exercise related to a New Zealand crime.

As such, in Tipping J's view, s 3 certainly did not allow the extraterritorial application of the Bill of Rights Act to non-New Zealand actors, in this case the Australian Federal Officers, though it may apply to New Zealand state actors abroad. Beyond this, the precise scope of the application of the Bill of Rights Act granted by Tipping J's analysis of s 3 is unclear.

The Bill of Rights Act generally grants rights to "everyone" or to "every person". The majority of these rights are rights which New Zealand state actors will be required to respect abroad, as control over an individual will mean that the individual's rights are vulnerable to breach by New Zealand state actors. Section 9 provides that: "Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment". This negative phrasing, combined with the use of "everyone" without caveat, requires respect for such rights even when New Zealand state actors act outside of New Zealand. When rights are vulnerable to breach by New Zealand state actors, those actors will be required to act consistently with the Bill of Rights Act. Examples of other the Bill of Rights Act rights which must be respected outside New Zealand include the right to life in s 8, the right in s 21 to be free from unreasonable search and seizure, the

89 See *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations* GA Res 2625, A/5217 (1970) at 123.

90 *R v Matthews*, above n 33, at 566.

91 At 566.

92 At 566.

93 At 566.

right in s 22 not to be arbitrarily arrested or detained, the s 17 right to freedom of association, and the s 13 right to freedom of thought, conscience, religion and belief. This article argues that these rights, and other similar rights, are applicable to New Zealand state actors, or persons in performance of a New Zealand public function acting abroad. The existence of an obligation to protect rights, and the level of protection, will be determined by the New Zealand state actor's level of control over, and so responsibility for, the affected individual.

This article argues that the Bill of Rights Act requires control over an individual by a state actor as the basis of its application abroad. Whenever an individual's rights are vulnerable to breach by a New Zealand state actor, s 3 requires the Bill of Rights Act to apply, as it would on New Zealand territory.

C Necessary Implication and New Zealand's International Obligations

Further, this article argues that a control model of the application of the Bill of Rights Act outside New Zealand is a necessary implication of the statute, as a consequence of the Bill of Rights Act's purpose. It is clear that the Bill of Rights Act is to be interpreted purposively,⁹⁴ and the purpose of the Bill of Rights Act, as set out in its long title, gives several conflicting indications as to the intended scope of the Act. It states that the Bill of Rights Act's purpose is:⁹⁵

- (a) to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
- (b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights

The first affirmation acts to protect human rights "... *in New Zealand*". This could be read as a limitation on extraterritorial application. However, in the author's view, this statement ought not limit the Bill of Rights Act's broader application. This is consistent with the opinion of Tipping J in *R v Matthews*.⁹⁶ The fourth recital to the preamble in the draft of the Bill of Rights Act that was appended to the White Paper that preceded the Bill of Rights Act affirmed the rights of "all the people of New Zealand".⁹⁷ The question of whether this phrase restricted the application of rights to citizens was raised at the select committee stage. The response of the committee was "except where ... expressly limited ... the rights in the bill would apply to all those in New Zealand in accordance with the normal rules of standing".⁹⁸ This is therefore unhelpful as an interpretive aid in deciding the possibility of extraterritorial application of the Bill of Rights Act, because if the statute does

94 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 278.

95 New Zealand Bill of Rights Act 1990, long title (emphasis added).

96 *R v Matthews*, above n 33, at 566.

97 Department of Justice *A Bill of Rights for New Zealand: A White Paper* (1985) at 67 (emphasis added).

98 "Interim Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand" [1986–1987] X AJHR I.8A at 24.

have application outside New Zealand, those to whom it applies will have standing to sue in New Zealand courts. It is important to see the replacement of the phrase "all the people of New Zealand" with the protection of rights "in New Zealand" as an attempt to render the section more expansive than it had been.

In the opinion of this author, the expansive nature of s 3 ought to override the apparent limitations of the first recital. Further, the Bill of Rights Act has dual purposes, the second of which is to affirm New Zealand's commitment to the ICCPR. Allowing extraterritorial application of the Bill of Rights Act is particularly important to affirm New Zealand's commitment to the ICCPR, as the jurisprudence concerning the ICCPR suggests that the Covenant ought to be interpreted to require states to respect rights when acting extraterritorially. In the White Paper, the importance of the ICCPR is repeatedly emphasised.⁹⁹ It has a key role in determining the substance of the Bill of Rights Act, as well as being an interpretive aid. The White Paper stated that although the Bill of Rights Act does not "incorporate or enact the Covenant ... its provisions are consistent with it."¹⁰⁰ Also, the New Zealand Government, when ratifying the ICCPR, "was satisfied that with a few minor exceptions (as to which reservations were made) our law complied with the obligations of the Covenant".¹⁰¹ For this reason, the extraterritorial application of the ICCPR, as interpreted by the United Nations Human Rights Committee and the International Court of Justice, ought to play a role in determining whether the Bill of Rights Act has extraterritorial application.

As discussed above, the ICCPR requires each state party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant".¹⁰² This has been interpreted as requiring that negative rights are upheld by state actors abroad, while the requirement to promote positive rights is limited. This is consistent with the proposed control model.

D A Restriction on the Extraterritorial Application of Some Rights

According to the authority or control model which this article advances as the preferable model, New Zealand state actors abroad would not be responsible for protecting individuals' rights where they have insufficient control or authority over an individual to do so. This limitation on the extraterritorial application of some rights is supported by the statutory language of the Bill of Rights Act. Section 3 of the Bill of Rights Act states that the Bill of Rights Act applies to acts done by New Zealand state actors. This provides no geographical or territorial limitation, and this article argues that this means that the Bill of Rights Act can apply extraterritorially. In contrast, some rights

⁹⁹ Department of Justice, above n 97, at 65 and 67.

¹⁰⁰ At 67.

¹⁰¹ At 67.

¹⁰² ICCPR, art 2(1).

contained within the Bill of Rights Act are territorially limited to New Zealand. These are rights which would otherwise require New Zealand state actors to protect individuals' rights despite having insufficient control or authority over an individual.

Although the possibility of extraterritorial application of rights was not considered in the drafting process, the Bill of Rights Act presents a remarkably consistent and coherent policy on what rights ought to apply abroad.¹⁰³ Sections of the Bill of Rights Act which would otherwise require New Zealand state actors to protect the rights of individuals over whom they have no authority or control are restricted to application in New Zealand territory through references to New Zealand or its laws or tribunals throughout the Bill of Rights Act. This article argues that that policy, revealed through the express limitations in statutory language, is a limitation on the requirement to ensure rights abroad where New Zealand state actors have insufficient control to do so.

The control distinction in the Bill of Rights Act is drawn roughly along the lines of what are traditionally termed "negative" and "positive" rights. As an example, rights such as the right to life and the right to be free from torture and cruel or inhuman treatment are generally considered to be negative rights. These are rights which are vulnerable to breach by New Zealand state actors if they exercise control over an individual abroad. In contrast, New Zealand state actors abroad are not responsible for enforcing rights such as access to justice, which are generally considered to be positive rights. However, this article does not adopt the terminology of "negative" and "positive" rights, as it is highly contested within the literature¹⁰⁴ and, in any event, does not accurately describe the phenomenon sought to be described in this article. Instead, this article distinguishes between rights which are vulnerable to breach by New Zealand state actors through the exercise of control or authority over an individual (which must not be breached by New Zealand state actors) and rights which New Zealand state actors abroad are not expected to be responsible for protecting because doing so would be both beyond their capability and a significant infringement on the sovereignty of another state.

In brief, where New Zealand state actors have sufficient control or authority over an individual to prevent the breach of his or her rights abroad, they are required to do so. Rights which fall within this category are the rights discussed above, such as the right to life and the right to be free from torture or cruel and unusual punishment, among others. If a New Zealand state actor has the ability to affect an individual's rights overseas, there will be jurisdiction in New Zealand under the Bill of Rights Act to deal with this.

In contrast, New Zealand state actors abroad will not have sufficient control to enforce or protect rights which would require substantial action by state actors, and interference with foreign political

103 The White Paper makes no comment on the possibility of the extraterritorial application of the New Zealand Bill of Rights Act 1990: see Department of Justice, above n 97.

104 See generally Henry Shue *Basic Rights* (Princeton University Press, Princeton, 1980).

or judicial systems. They cannot be required to ensure these rights merely as a consequence of their physical control over an individual, as they do not have sufficient control or authority to guarantee the rights. This is consistent with the underpinnings of any presumption against the extraterritorial application of legislation, namely an awareness of comity and foreign sovereign power, as well as a desire that any legislation be enforceable. If the Bill of Rights Act requires New Zealand state actors abroad to do the impossible such as ensure free and fair elections in the state in which they are present, it would be ineffective, unenforceable and in breach of international law due to its significant infringement on the territorial sovereignty of another nation.¹⁰⁵

Consistently with the control approach described above, and with the requirements of international law, the language of the Bill of Rights Act specifically restricts the application of some rights abroad. They are discussed in detail in the following sections.

1 Electoral rights

New Zealand state actors acting abroad do not have sufficient control or authority to ensure electoral rights to foreign nationals in their states. Requiring New Zealand state actors to enforce electoral rights abroad would require considerable positive action by the New Zealand state actors, and enforcing such rights abroad would amount to an infringement of the sovereignty of the foreign state. According to the classical conception, electoral rights and rights to justice are negative rights.¹⁰⁶ In New Zealand, which already has active and effective political and electoral structures in place, ensuring electoral rights requires no change to the status quo. For this reason, electoral rights in New Zealand can be conceived of as rights not to be interfered with when voting. However, even in this context, the conception of the right as a negative one is highly contested.¹⁰⁷ In the context of ensuring rights extraterritorially, particularly in a state in which a functioning electoral system may not already exist, the positive action required from New Zealand state actors to enforce electoral rights would range from the organisation of periodic elections and the protection of voters' physical security, to the printing of ballot papers.¹⁰⁸ A requirement to ensure electoral rights abroad would put a significant and unrealistic burden on New Zealand state actors. It would also constitute a large and unjustifiable interference with the internal affairs of the state in which the New Zealand state actors were present.¹⁰⁹

¹⁰⁵ *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, above n 89, at 123.

¹⁰⁶ Charles Freid *Right and Wrong* (Harvard University Press, Massachusetts, 1978) at 133.

¹⁰⁷ See generally Cecile Fabre "Constitutionalising Social Rights" (1998) 6 JPP 263.

¹⁰⁸ Fabre, above n 107, at 269.

¹⁰⁹ *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, above n 89, at 123.

The language of s 12 of the Bill of Rights Act supports this principle-based reasoning. Section 12 describes the electoral rights granted by the Bill of Rights Act. Specifically, it states that:

Every New Zealand citizen who is of or over the age of 18 years –

(a) has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and

(b) is qualified for membership of the House of Representatives.

The words of the statute clearly limit the application of electoral rights under the Bill of Rights Act to New Zealand citizens. In the White Paper, it is stated that this is because the aim is to provide for basic principles, rather than to limit the possible application of the right.¹¹⁰ Although it is not conceived as a maximum, s 12 constitutes the core of the right as granted by the Bill of Rights Act. Further, the reference to the House of Representatives clearly refers to the House of Representatives of New Zealand. Again, it is absurd to suggest that New Zealand state actors could be held responsible for failing to secure genuine periodic elections in other nations, as this would be a significant interference with the sovereignty of the other state. The Bill of Rights Act electoral rights are clearly limited to elections to the House of Representatives of New Zealand. The statutory language will not allow for another interpretation. However, s 12 would apply extraterritorially to the extent that government agents are required to ensure that New Zealand citizens abroad who are over the age of 18 have the opportunity to vote in elections of the New Zealand House of Representatives. New Zealand state actors have the authority to affect this right and the ability to ensure it for New Zealand citizens overseas.

2 *Rights of persons arrested, detained and charged, and minimum standards of criminal procedure*

Similarly to electoral rights, enforcing rights to justice and minimum standards of criminal process in New Zealand simply requires the continued effective functioning of the judicial and policing systems. To ensure such rights abroad, these systems would need to be created by New Zealand state actors. Sections 23 and 24 of the Bill of Rights Act describe the rights of persons arrested, detained and charged, and s 25 describes minimum standards of criminal procedure. Sections 23(1) and 23(4) describe the rights of "[e]veryone who is arrested or who is detained under any enactment", while the rights in ss 23(2) and 23(3) are those of "[e]veryone who is arrested for an offence". Sections 24 and 25 both consider the rights of "[e]veryone who is charged with an offence". Although these rights are expected to be ensured by the Government of New Zealand in New Zealand, ensuring them in a foreign state system would be near to an impossible task for New

¹¹⁰ Department of Justice, above n 97, at 77.

Zealand state actors, and a violation of the sovereignty of the foreign state.¹¹¹ As such, it is a task which New Zealand state actors ought not to be required to undertake merely because of their presence in the foreign state, or their control over a foreign national abroad. Once the onerous nature of ensuring the rights – for example, of those charged with an offence under ss 24 and 25, in the absence of a pre-existing judicial system – is understood, the differentiation in language between ss 23–25 and s 22 seems rational. By contrast with the ss 23–25 rights, the right not to be arbitrarily arrested or detained¹¹² and the right to be treated with dignity and respect when detained¹¹³ are vulnerable to breach by New Zealand state actors abroad and ought to be complied with.

In *R v Matthews*, the only case directly considering the extraterritorial application of the Bill of Rights Act, Tipping J argued that the reference to "any enactment" in s 23(1) must refer to a New Zealand enactment, following normal statutory interpretation principles.¹¹⁴ This article argues that Tipping J is correct in his analysis. Section 29 of the Interpretation Act 1999 defines an enactment as "the whole or a portion of an Act or regulations", and defines an Act as "an Act of the Parliament of New Zealand or of the General Assembly". Although the rules in the Interpretation Act generally only apply unless the context requires otherwise, this points towards the reference to any enactment in s 23 of the Bill of Rights Act meaning a New Zealand enactment.

However, the Interpretation Act does not give a definition of arrest, detention, being charged, offence or tribunal. In Tipping J's analysis, arrest in the Bill of Rights Act "must, of course, mean arrested in terms of the meaning of that word as established by the Courts of New Zealand."¹¹⁵ Although he gives no reasoning for this assertion, it is valid following the statutory interpretation rule that words be given their natural and ordinary meaning in light of the statute's context and purpose. This interpretation is supported by the White Paper's description of what constitutes an offence, which states that it "primarily means acts punishable under criminal law" and refers to s 2 of the Crimes Act 1961.¹¹⁶ It is likely that the Bill of Rights Act intended to adopt the Crimes Act's definition of offence. When *Matthews* was decided and until 2013, s 2 of the Crimes Act defined an offence as an "act or omission for which any one can be punished under this Act or under any other enactment". As such, it is almost certain the word "offence" in the Bill of Rights Act refers to conduct which constitutes an offence under New Zealand law, and hence that the term "arrested"

111 *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, above n 89, at 123.

112 New Zealand Bill of Rights Act 1990, s 22.

113 New Zealand Bill of Rights Act 1990, s 23(5).

114 *R v Matthews*, above n 33, at 568.

115 *R v Matthews*, above n 33, at 568.

116 Department of Justice, above n 97, at 94.

refers to New Zealand law's understanding of that term. Similarly, the phrase "charged with any offence" must have the meaning that it would have in the courts of New Zealand.

Moreover, a similar argument concerning the infringement on state sovereignty applies with reference to courts as to Parliament. It would be a significant infringement on the sovereignty of the other state for New Zealand state actors to attempt to enforce due process rights in the courts of another state.

The specific rights granted in ss 23(1)–23(4), 24 and 25 can be contrasted with the more general rights provided by ss 22 and 23(5). Section 22 provides that "[e]veryone has the right not to be arbitrarily arrested or detained", while s 23(5) states that "[e]veryone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person". Both of these are general, and generally applicable, rights. The term "detain" in this case is not limited by the phrase "under any enactment" and therefore it can be read to include detentions not in accordance with a particular piece of New Zealand legislation. This means that while the specific procedural protections of ss 23(1)–23(4), 24 and 25 may not apply abroad, this does not give New Zealand state actors a clean slate to act contrary to rights. They remain bound by the more generally phrased provisions not to detain individuals arbitrarily, and to treat those deprived of liberty with humanity and respect.

3 *Freedom of movement*

Freedom of movement in s 18 of the Bill of Rights Act is specifically territorially limited by its repeated references to New Zealand:

- (1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.
- (2) Every New Zealand citizen has the right to enter New Zealand.
- (3) Everyone has the right to leave New Zealand.
- (4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

This section clearly limits the right of freedom of movement to New Zealand. On the strict interpretation of the words, there is an extraterritorial element in that, for a citizen to have a right to enter New Zealand, the citizen must be outside New Zealand at the time that they hold that right. Otherwise, the right is limited to application within New Zealand territory. New Zealand state actors cannot be expected to ensure rights of freedom of movement in relation to the borders of other sovereign states because that would interfere significantly with that state's territorial sovereignty and integrity.

Despite the territorial limitation on the right of freedom of movement, ss 17 and 22, which allow for freedom of association and the right not to be arbitrarily arrested or detained respectively, still

place some bar on unlawful or arbitrary action by New Zealand state actors with respect to mobility rights.

4 Non-discrimination rights and the rights of minorities

Section 19 of the Bill of Rights Act delineates the right of freedom from discrimination:

(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

The prohibited grounds of discrimination are listed in s 21 of the Human Rights Act 1993. The Human Rights Commission's work is territorially limited. Its primary functions as set out in s 5(1) of the Human Rights Act are:

(a) to advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society; and

(b) to encourage the maintenance and development of harmonious relations between individuals and among the diverse groups in New Zealand society.

This could be an argument for the territorial limitation of the right to be free from discrimination. However, the words of the Bill of Rights Act provision do not limit the rights in the same way as the Human Rights Act does but merely adopt the grounds of discrimination contained within it. This will mean that New Zealand state actors will breach the Bill of Rights Act if they discriminate on one of the prohibited grounds in the Human Rights Act when acting abroad. This will apply both with respect to New Zealand nationals and foreign nationals.

Section 20 of the Bill of Rights Act describes the rights of minorities, limiting these to a "person who belongs to an ethnic, religious, or linguistic minority in New Zealand". This section clearly cannot be applied extraterritorially to protect the rights of minorities abroad to "enjoy the culture, to profess and practise the religion, or to use the language" of their minority group. The plain statutory language does not allow for extraterritorial application of the right. This means that New Zealand state actors abroad could not be required to enforce the rights of minorities overseas.

5 Retroactivity and double jeopardy

Section 26(1) of the Bill of Rights Act is clearly limited in its application to New Zealand. Section 26 as a whole states that:

(1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

(2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

It is nonsensical to suggest that s 26(1) is not limited to New Zealand. If it was not, no person abroad could be convicted of an offence which is an offence under the law of the country in which they are situated but which is not an offence under New Zealand law.

Although on its face s 26(2) could apply extraterritorially, to require New Zealand state actors to protect individuals against double jeopardy in foreign courts would be an excessive intrusion on the sovereignty of the other state. It cannot be expected by the Bill of Rights Act. However, such rights will apply with respect to New Zealand-run overseas courts or tribunals such as courts martial that take place abroad. New Zealand state actors have full control over such tribunals and it is no interference with the sovereignty of the host state for these rights to apply in such tribunals.

6 *Right to justice*

The right to justice is described in s 27, which refers in ss 27(1) and 27(2) to the role of a "tribunal or other public authority". In an analysis similar to the above concerning the meaning of House of Representatives, this article argues that the reference to a "tribunal or other public authority" must be read as referring to a New Zealand tribunal or public authority. This is again because requiring New Zealand state actors to secure individuals' rights to natural justice¹¹⁷ or judicial review¹¹⁸ in a foreign tribunal would be a significant imposition on the sovereignty of the foreign state and therefore contrary to international law.

The consequence of this is that New Zealand state actors acting abroad do not breach the Bill of Rights Act if they fail to provide for the observance of natural justice or the possibility of judicial review in the courts of the overseas territory in which they are acting. However, similar to the above, they are still required to respect such rights in relation to New Zealand-run overseas tribunals, or public authorities that take place overseas, such as courts martial.

Section 27(3) provides a more general right, whereby:

Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

Although it gives the right to take an action against the New Zealand Crown, this right is not limited to a class of persons, such as New Zealand citizens. Neither is it limited by territory. As such, although the right to justice in the Bill of Rights Act does not require New Zealand state actors abroad to secure fair trial rights and access to justice in foreign courts, it does give a general right

¹¹⁷ New Zealand Bill of Rights Act 1990, s 27(1).

¹¹⁸ New Zealand Bill of Rights Act 1990, s 27(2).

for any individual to bring proceedings against the Crown whether the breach of their rights occurs in New Zealand or abroad.

Ultimately, although it is reasonably clear that extraterritorial application was not considered by the drafters of the Bill of Rights Act, there is a clear consistency in the statutory language with a model requiring the Bill of Rights Act to apply overseas only when s 3 actors have sufficient authority or control to respect or ensure such rights.

E Procedural Obligations Arising From Non-Interference Rights

Some procedural rights and duties may flow from the non-interference rights. Many commentators suggest that some positive obligations are implicit in all rights.¹¹⁹ Each right is considered to have corollary duties incumbent on the state, which are not limited to non-interference with the right, but instead require positive action. These include, for example, the duty to prevent others from interfering with the right, and the duty to provide the means to further the right and to take steps towards making the fulfilment of the right possible.¹²⁰ The text of the Bill of Rights Act gives no indication as to the extraterritorial application of such duties.

This article suggests that such positive duties ought to be adhered to when New Zealand state actors have sufficient authority or control to do so. To the extent that the positive obligations require no interference with the state systems, but only compliance by New Zealand state actors, New Zealand ought to be bound by them. This is consistent with concerns about comity and foreign state sovereignty which would otherwise restrict the extraterritorial application of rights. In other jurisdictions, such as the United Kingdom, positive procedural duties of investigation arising from negative rights such as the right to life are considered applicable extraterritorially.¹²¹ If New Zealand is required to undertake positive duties arising from negative rights consistently with the control conception of jurisdiction, then it does not mean New Zealand state actors are bound by positive duties wherever it could affect an individual.¹²² New Zealand state agents abroad will not be bound by duties arising from negative rights of individuals abroad unless they have the necessary control, and therefore have the ability, to comply with such positive obligations.

F Use of Section 5 of the Bill of Rights Act

New Zealand is particularly well placed to develop a coherent and principled jurisprudence for the extraterritorial application of the Bill of Rights Act, due to s 5 of the Bill of Rights Act. The section provides that:

¹¹⁹ See generally Shue, above n 104.

¹²⁰ Fabre, above n 107, at 272–273.

¹²¹ *R (Al-Skeini) v Secretary of State for Defence*, above n 5, at [36].

¹²² Milanovic, above n 9, at 207.

...the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 5 has been described as a "weighing exercise that calls for attention to the particular circumstances of the particular case".¹²³ It allows for "public policy analysis and value judgments on the part of the Court".¹²⁴ As such, the rights in the Bill of Rights Act can be interpreted flexibly, and consideration can be given to the difficulties of applying the Bill of Rights Act abroad, particularly in conflict zones or during occupation. New Zealand has a highly developed system of balancing rights, which allows rights to be limited fairly and appropriately.

In *R v Hansen*, the Supreme Court demonstrated a variety of approaches to s 5.¹²⁵ McGrath J wrote a comprehensive analysis as part of the majority, in which he stated that to be prescribed by law, as required by s 5, limitations on rights need to be:¹²⁶

... identifiable and expressed with sufficient precision in an Act of Parliament, subordinate legislation or the common law. The limits must be neither ad hoc nor arbitrary and their nature and consequences must be clear, although the consequences need not be foreseeable with absolute certainty.

He then proceeded to identify a test for whether a limitation on a right was justifiable in a free and democratic society. First, McGrath J required an investigation into the intent and objective of the actor, stating that the "objective to be served by the measure limiting the right has to be sufficiently important to warrant overriding the constitutionally protected freedom",¹²⁷ and that it:¹²⁸

... must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective, ... [it] should impair the right in question as little as possible, ... [and] there must be proportionality between the effects of the limiting measure and its objective.

This analysis can be useful in determining what constitutes legitimate state action abroad in the same way as it is useful in New Zealand, although courts have historically been reluctant to make rulings on the executive's international action. This is because such action raises issues about the separation of powers, deference to Parliament and the executive, and interference with international relations. Courts examining executive action abroad are frequently motivated by fears about their

¹²³ Butler and Butler, above n 40, at 149.

¹²⁴ *Ministry of Transport v Noort*, above n 94, at 283.

¹²⁵ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

¹²⁶ At [180] (footnotes omitted).

¹²⁷ At [203].

¹²⁸ At [204].

constitutional and institutional competence,¹²⁹ especially when they are called on to assess the conduct of the executive during wartime.¹³⁰ The *Khadr* decision referred to earlier failed to grant an effective remedy, making a declaration that Khadr's rights had been breached rather than requiring particular executive action. This was due to "the limitations of the Court's institutional competence and the need to respect the prerogative powers of the executive".¹³¹

However, s 5 of the Bill of Rights Act provides a flexible mechanism to allow deference where it is due. The section is functionally identical to s 1 of the Canadian Charter, which states that the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In the Canadian context, Maureen Webb suggests that a justified limitation could be phrased as "complying with a conflicting international obligation"; ... 'running an efficient war'; ... or 'the effective prosecution of criminal law through transnational cooperation', and that "[a]ll of these are serious objectives, to which the courts can give due deference".¹³² Section 5 provides a means to allow the consideration required while maintaining awareness of the extraterritorial context, which may differ significantly to the national one.

While being sensitive to the extraterritorial context and allowing flexibility on the merits of the claim, it is important to recognise the risk that the Bill of Rights Act could be "watered down so much in an extraterritorial setting as to be rendered toothless".¹³³ The rights contained in the Bill of Rights Act must not be reduced so that it applies extraterritorially but affords meagre rights protection where it applies. Elias CJ recognised the importance of this in *R v Hansen*, where she stated that "it is important not to collapse the s 5 assessment into the interpretation of the right".¹³⁴ When rights are applied extraterritorially, the content of the right must be maintained, and that must be followed by an assessment of whether any infringement was justified. It is not useful to "recognize constitutional rights as potentially applicable worldwide, and then balance them away".¹³⁵ The fact that the Bill of Rights Act applies must not be used to legitimise state actions against individuals which are unacceptable. Although a balancing act is crucial to the appropriate

129 Milanovic, above n 9, at 99.

130 Kent Roach "The Supreme Court at the Bar of Politics: The Afghan Detainee and Omar Khadr cases" (2010) 28 NJCL 115 at 147.

131 *Canada (Prime Minister) v Khadr*, above n 7, at 46.

132 Maureen Webb "The Constitutional Question of Our Time: Extraterritorial Application of the Charter and the Afghan Detainees Case" (2011) 28 NJCL 235 at 297.

133 Milanovic, above n 9, at 114.

134 *R v Hansen*, above n 125, at [42].

135 Gerald L Neuman "Whose Constitution?" (1991) 100 Yale LJ 909 at 920.

application of rights extraterritorially, it must not be taken too far. In granting such rights, courts must be prepared to enforce them against the state where the circumstances allow and require it.

The s 5 mechanism also means that the objections that the state's obligations to protect the rights of individuals will be too restrictive of their operations during wartime should not limit the Bill of Rights Act's extraterritorial application. Section 5 allows a close consideration of the content of the right at issue, and any surrounding circumstances which may alter the assessment of reasonableness. Further, although it is beyond the scope of this article to give a detailed consideration to such matters, the existence of international humanitarian law creates a framework within which rights should be interpreted during conflict, as it is *lex specialis* in that context, being a more specific regime which will override the more general law of human rights.¹³⁶

Once extraterritorial application of the Bill of Rights Act is allowed, and cases on the issue progress to the merits, the use of s 5 would be a final tool to allow a principled, flexible and effective application of the Bill of Rights Act abroad. It would prevent the imposition of unrealistic and unhelpful requirements on New Zealand state actors, while still upholding the universality of rights and requiring compliance with the Bill of Rights Act.

V CONCLUSION

The possibility of the extraterritorial application of the Bill of Rights Act is currently particularly important, as other domestic jurisdictions struggle to find the best way to apply their human rights regimes beyond their borders. New Zealand is in the position to create a principled and justifiable jurisprudence concerning the extraterritorial application of the Bill of Rights Act.

This article set out to establish an appropriate model for the application of the Bill of Rights Act outside New Zealand. It first considered the potential legal and policy issues which may militate against such application but found that neither provided compelling arguments against the Bill of Rights Act's application abroad. It then considered approaches taken in other jurisdictions. Having done that, it suggested that the appropriate model for the Bill of Rights Act's application overseas was a model built around the twin concepts of control and causation, where control over an individual means that a New Zealand state actor has caused the alleged breach of rights. It then turned to a close analysis of the statutory language of the Bill of Rights Act, which it found to be consistent with the proposed model. Indeed, the article argued that the statutory language of the Bill of Rights Act, combined with the Bill of Rights Act's purpose, obliges New Zealand state actors abroad to respect human rights. It suggested that, generally, the statute and the policy rationales impose an obligation to respect individuals' rights if the New Zealand state actor has control over an individual. On an analysis of the language which describes particular rights, there are some limitations of the extraterritorial application of the Bill of Rights Act which are consistent with this

¹³⁶ Webb, above n 132, at 297.

general rule. Several rights that would require positive actions to be taken by New Zealand state actors, rather than requiring simple non-interference, are either explicitly or implicitly territorially limited to New Zealand. As such, the Bill of Rights Act restricts the application of rights abroad to rights which must be respected by state actors abroad. The Bill of Rights Act does not require rights to be ensured abroad when that would require significant interference with sovereign equality or comity. This is consistent with New Zealand's obligations under the ICCPR and with the limited existing case law.

Ultimately, this article suggests that New Zealand is particularly well placed to develop an effective and fair jurisprudence on the extraterritorial application of the Bill of Rights Act, specifically suggesting that the use of s 5 justified limitations would rationally and fairly limit the extension of the Bill of Rights Act at the merits stage, rather than cutting off claims for lack of jurisdiction, or lack of applicability of the Bill of Rights Act under s 3.