LOCAL GOVERNMENT: RESPECTING THE RIGHTS OF OUR CHILDREN

(RESEARCH BEHIND THE PUBLISHED PAPER)

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*This paper was written by **Aaron Irving** for UNICEF NZ. It remains a work in progress.*

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UNICEF NZ is very grateful to Aaron for his dedication, determination and perseverance to emphasise the significance of children's rights in the context of the places that they live, play, learn and grow.

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I INTRODUCTION

UNICEF (the United Nations Children's Fund) was established by the United Nations to advance the rights, protection and healthy development of all children. Our mandate comes from the member states of the UN and the Convention of the Rights of the Child (UNCROC). The Convention on the Rights of the Child (1989) is the most widely ratified UN treaty ever. This speaks decisively to the importance the world places on the protection, care and healthy development of children.

New Zealand ratified the Convention in 1993 and in so doing committed itself to upholding children's rights as stated in the UNCROC in policy, practice and, where feasible, in law. Each country reports on its implementation of the principles of the Convention to the UN Committee for Children (UN CRC) in Geneva every five years. In New Zealand, the Ministry of Social Development is responsible for coordinating the report. The latest report was submitted in late 2008 and a response will come from the UN CRC sometime during 2011. Non- governmental organisations concerned with children's issues and rights will take the opportunity to respond to the Government's report and provide a report from their collective perspective to the UN CRC in 2010.

The central principle of the UNCROC is that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

Child Friendly Cities

UNICEF NZ is party to the international Child Friendly Cities Initiative (CFCI) and hosted the visit to New Zealand of an international expert on the topic in 2009.

Underpinning the CFCI is the reality that people's lives are shaped by early experiences and as local authorities are on the front line in matters affecting children they need to be particularly mindful of the impact of on children of any decision or activity of local government.
Where and how children live, learn, grow and play depends on adults, who are well informed about children's rights, views and needs. Children's value as important stakeholders in the city and its future should be reflected in decisions that are made on their behalf.

Children have the right to influence decisions about their city and community, to participate in the cultural and social life of the community, have their opinions canvassed and given consideration when adults make decisions that impact on them. A far-sighted governance plan will recognise the potential and value of endorsing this position.

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Under the provisions of the Local Government Act 2002 (LGA) local authorities have a specific mandate to promote the social, economic, environmental and cultural wellbeing of its communities, and of course children are naturally included in those communities.

II UNCROC AND ITS DOMESTIC LEGAL STATUS

The orthodox view of international rights treaties as Joseph contends is that international human rights treaties do not form part of New Zealand law and so are unable to be enforced by the courts, unless and until the rights contained in the treaty to which New Zealand is party, are incorporated by statute into domestic law.[1] However, it is now firmly established that New Zealand Courts when interpreting legislation or making decisions affecting children must do so in a way that gives effect to the rights conferred by UNCROC unless the plain words of the legislation preclude such an interpretation. Decision-making in New Zealand by local governments' proceeds on the basis that there is no need to interpret Local Government empowering legislation consistently with the UNCROC or consider the UNCROC in its decision-making process, as it has already been ratified and implemented. It is UNICEF NZ's contention that the UNCROC is under-implemented in New Zealand legislation, and this under-implementation is especially so in legislation that empowers Local Government.

A review of New Zealand's Law prior to ratification of UNCROC indicated that New Zealand's domestic legislation was UNCROC 'compliant'.[2] This review and subsequent ratification presupposes that New Zealand's domestic law is consistent with UNCROC and its principles. However the implementation of the convention was nowhere near this straightforward. Robert Ludbrook points out::[3]

> "*A careful scrutiny of the relevant legislation and departmental policies would have elicited hundreds of areas of non-compliance but MERT relied on information from the agencies that responded and, with honourable exceptions, the agencies treated the request with cavalier indifference. Of the areas of inconsistency identified only a small number were the subject of reservations.*"

One of the areas where it is arguable that the UNCROC is under-implemented is in Local Government legislation.

[1] Philip A Joseph *Constitutional Law* (Lexis Nexis New Zealand Online, 2009) Para 196.
[2] Robert Ludbrook "UNCROC at 20: Robert Ludbrook on UNCROC"(2 November 2009) http://www.unicef.org.nz/page/326/RobertLudbrookonUNCROC.html (accessed 20th November, 2009).
[3] Robert Ludbrook "UNCROC at 20: Robert Ludbrook on UNCROC"(2 November 2009) http://www.unicef.org.nz/page/326/RobertLudbrookonUNCROC.html (accessed 11th March, 2010).

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Given this it is arguable that the wide drafting of the Local Government Act 2002 and other legislation that empowers local government indicates that such legislation should be read according to the '*presumption of consistent interpretation*' with unimplemented or under-implemented treaties which in turn amounts to indirect implementation.[4]

The Courts and other commentators have shown that to ignore New Zealand's international obligations, simply because they are under-implemented and not fully incorporated into New Zealand's domestic statutory framework is an '*unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing.*"[5]

This point is reiterated by Ludbrook who maintains that the approach to human rights treaties such as the UNCROC that they should not be ratified until domestic legislation was fully compliant is misconceived;[6]

> "*New Zealand should not ratify human rights Conventions unless NZ legislation was fully compliant at the time of ratification and that any areas of inconsistency should be made the subject of a reservation. This approach resulted from a misconception about the nature of such Conventions*."

This 'full incorporation approach' to the UNCROC is incorrect for two reasons; Firstly, because an obligation to 'progressively implement' the UNCROC exists in Article 4 of the Convention[7] and secondly, because human rights treaties are *sui generis* in that they are normative and contain special characteristics.

The obligation to progressively implement the rights and principles of the Convention are set out in Article 4 which requires that;[8]

> "*States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.*"

This obligation to 'undertake such measures' is clearly in line with other International Conventions,[9] which place on states-parties the obligation of '*progressive realisation*'.

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[4] Claudia Geiringer "*Tavita* and all That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66.
[5] *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 267 (CA) Cooke P.
[6] Robert Ludbrook "UNCROC at 20: Robert Ludbrook on UNCROC"(2 November 2009) http://www.unicef.org.nz/page/326/RobertLudbrookonUNCROC.html (accessed 11th March, 2010).
[7] Robert Ludbrook "UNCROC at 20: Robert Ludbrook on UNCROC"(2 November 2009) http://www.unicef.org.nz/page/326/RobertLudbrookonUNCROC.html (accessed 11th March, 2010).
[8] United Nations Convention on the Rights of the Child ("UNCROC") (20 November 1989) 1577 UNTS 3, art 4.

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This concept of progressive realisation "constitutes recognition of the fact that full realisation of economic, social and cultural rights will not be able to be achieved in a short period of time."[10] Given this, a comprehensive review of New Zealand legislation to ascertain compliance is not required. Ludbrook wrote;[11]

> *"If New Zealand laws, policies and practices are fully compliant, ratification becomes an empty gesture. This misapprehension has led to the error that because NZ laws and policies were found prior to ratification to be fully consistent with the Convention no further action is required."*

Furthermore;

> "*Because of this, no attempt has been made to review all laws, policies and administrative practices to identify areas of non-compliance or doubtful compliance despite recommendations from the UN Committee on the Rights of the Child that this be done."*

The *sui generis* nature of human rights treaties is emphasized by Martin Scheinin;[12]

> "*…describing them as a semi-autonomous or self-contained regime that operates according to rules that reflect its own characteristics and that as 'lex specialis' deviate from (valid) rules of public international law."*

It is arguably this status as *lex specialis* that makes the UNCROC and arguably other unimplemented or under-implemented Human Rights treaties applicable to Local Government.

Local Government empowering legislation like the Local Government Act 2002 is wide and principle based and its effects conflict with individual human rights. Given the position of Local Government in the New Zealand constitutional framework, the obligation to interpret empowering legislation in such a way as not to derogate from the rights enshrined in these international human rights instruments is stronger. This '*presumption of consistent interpretation'* recognises the *sui generis* nature of human rights treaties, and is consistent with the approach to human rights treaties championed by the Courts.[13] More importantly the presumption of consistent interpretation gives New Zealand the freedom to be compliant with Article 4 of the UNCROC without having to reduce its principles to the black and white of the statute books. Furthermore the UNCROC exists as a constant influence not only on the

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[9] See International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3, Article 2.

[10] Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (3rd Ed, UNICEF Regional Office for Europe, Switzerland, 2007) 53.

[11] Robert Ludbrook "UNCROC at 20: Robert Ludbrook on UNCROC"(2 November 2009) http://www.unicef.org.nz/page/326/RobertLudbrookonUNCROC.html (accessed 11th March, 2010).

[12] Martin Scheinin "Human Rights Treaties and the Vienna Convention on the Law of Treaties – Conflicts of Harmony" CDL-UD(2005)014rep (UNIDEM Seminar - *The Status of International Treaties on Human* Rights - Coimbra (Portugal), 7-8 October 2005) http://www.venice.coe.int/docs/2005/CDL-STD(2005)042-e.asp (accessed 11th March, 2010).

[13] See *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) Cooke P; and the Section of this paper on Judicial Approaches.

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interpretation of fundamental rights of children in New Zealand but also in the application of them. For Local Government UNCROC could represent not only a subsidiary source of law but also a point of reference on the direction New Zealand wishes to take in the context of children's rights.

A The Status of the Principles of UNCROC

In addition to an international obligation that binds New Zealand, the UNCROC represents a set of norms that are widely ratified internationally. The UNCROC is in force in virtually the entire community of nations, making it one of the most universally ratified treaties in history.[14] This wide ratification of UNCROC speaks volumes as to the customary nature of the norms contained within the Convention. There are some commentators who contend that this wide acceptance is indicative of the Convention codifying already accepted international customary norms,[15] but others who hold the view to be radical. UNICEF supports Dan Seymour's view;[16]

> "*The rights contained within the CRC reflect some that are understood to apply to all human beings as customary international law, but [he] would say there is no case that the majority of the articles do. The threshold for customary status must be quite high for such status to have jurisprudential value. The majority of the articles would not, in [his] opinion, have such status*."

A better argument is that contained within the UNCROC of emerging customary norms of international law; "codified principles that member states of the United Nations agreed to be universal – for all children, in all countries and cultures, at all times and without exception, simply through the fact of their being born into a human family"[17] ACYA New Zealand in its submission on the Government (Auckland Council) Bill outlined the these emerging customary norms as the four general principles of UNCROC;[18]

1. The principle of non discrimination (Article 2)
2. The right to life, survival and development (Article 6)
3. The principle of respect for the views of the child (Article 12)

[14] UNICEF, Convention on the Rights of the Child - Frequently Asked Questions - http://www.unicef.org/crc/index_30229.html (accessed 16 March 2010).
[15] Human Rights Commission Submission on the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill - Justice and Electoral Select Committee (Human Rights Commission**,** 1 March 2006) http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/03-Jul-2009_11-58-43_Section_59_Mar_06.doc (accessed 18th November 2009) Para 1.3.
[16] Dan Seymour, "Re: Information on UNCROC as Customary International Law" Personal Communication. Monday, 23 November 2009.
[17] Dan Seymour "The Convention on the Rights of the Child - CRC Turns 20 - 1989-2009: Convention brings progress on child rights, but challenges remain" http://www.unicef.org/rightsisde/237.html (accessed 17/11/2009).
[18] ACYA NZ "Submission for the Local Government (Auckland Council) Bill" Association of Children and Young People of Aotearoa (25th June 2009).

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4. The principle of the best interests of the child (Article 3).

Customary International Law is binding not only on the state but within the state as law of the land, without implementation and is directly applicable by the Courts.[19] The status of the four principles as only emerging customary norms in no way precludes the courts from applying them as international custom as the principles are enshrined in the UNCROC and are ratified and in force in almost every country making them binding on the state. Furthermore the protection and application of them by the courts would only serve to further their status as customary international norms. However what is important here is not the how the general principles of the UNCROC will hold up in Court, but the reality of the obligation to employ them in local Government decision-making by local authorities. The direct application of the four customary principles outlined by ACYA above to Local Government is in no way an extreme or even a new idea. In a presentation to the Waitakere City Council in 1999, Peter Newell not only outlined the applicability of these principles at the Local Government level, he outlined how they could be implemented in Local Government decision-making.[20]

1 The Principle of Non-Discrimination

For a Local Government to successfully apply this principle it needs to address the child demographic directly. Newell argues that in order to implement child rights without discrimination an authority needs to be aware of not only the children who are likely to be marginalized or excluded, they also have to be aware of the particular ways in which these children may be discriminated against.[21]

2 The Right to Life, Survival and Development

Newell points out that this general principle covers a broad spectrum of potential rights violations – as it involves issues of health and education which Local Governments are intimately connected with, albeit often indirectly. It is arguable that this principle is aimed at Central Government to make provision for the necessities of life for children. However its broad language underlines the need for a holistic approach that recognises the peripheral and yet essential services that are the responsibility of Local Governments; which have a direct effect on the life, survival and development of children. These peripheral services could

[19] *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, 57-62 (CA).
[20] Peter Newell "Child Advocacy in Local Government" (24 Novemeber, 1999) Presentation to Waitakere City Council.
[21] Peter Newell "Child Advocacy in Local Government" (24 Novemeber, 1999) Presentation to Waitakere City Council, 5.

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include zoning of schools and hospitals, water and air quality, waste disposal, traffic management, transport and roading.

Newell contends that the concept of development is best fleshed out by considering the other articles of the Convention, as unlike the ICCPR and the ICESCR, the UNCROC "uniquely covers economic, social and cultural rights as well as civil and political rights."[22] Newell recommends defining this right of development in light of the Articles 27 and 31 of UNCROC. Development is more than the "provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity,"[23] it is also the provision of a "standard of living adequate for the child's physical, mental, spiritual, social and moral development."[24]

The section of this paper on 'sustainable development' discusses economic, social and cultural rights in the context of the Local Government Act and points out that the *Child's* 'right to development' is also clearly articulated in legislation that empowers Local Government in New Zealand.[25]

3 The Principle of Respect for the Views of the Child

This principle recognises and protects the child's right to express their views freely and have them given due weight. Newell argues that the right to express themselves is more than mere participation and more than mere consultation, this right wants children involved in the decision-making process from top to bottom, in any decision that affects them.[26]

There are a number of ways to involve children in the decision making process, and to ensure that their input is given due weight, these include each council having as part of its framework a formal mechanism that recognises and implements children's' rights and interests, this could include a 'Local Council Office for Children' or a 'Children's' Desk'.[27] Other mechanisms include special council hearings, special local youth councils, or simply

[22] Peter Newell "Child Advocacy in Local Government" (24 Novemeber, 1999) Presentation to Waitakere City Council, 5.
[23] United Nations Convention on the Rights of the Child ("UNCROC") (20 November 1989) 1577 UNTS 3, art 31.
[24] United Nations Convention on the Rights of the Child ("UNCROC") (20 November 1989) 1577 UNTS 3, art 27.
[25] *See* Local Government Act (No 84) 2002, Resource Management Act (No 69) 1991.
[26] Peter Newell "Child Advocacy in Local Government" (24 Novemeber, 1999) Presentation to Waitakere City Council, 6-8.
[27] Aaron Irving, "The United Nations Convention on the Rights of the Child (UNCROC) and Local Government in New Zealand: The legitimisation of UNCROC at Local Government level" *Feedback to Auckland Transition Agency on the* Discussion Document – *Organisational* Structure and Staff Transition.(UNICEF New Zealand, 2 November 2009) http://www.unicef.org.nz/store/doc/RelationshipbetweenUNCROCandAKLCouncil.doc (accessed 16 March, 2010).

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inviting youth to conduct question and answer sessions or to comment on services or policy proposals.[28]

4 The Principle of the Best Interests of the Child

This principle (or as it is also referred the *principle of paramountcy of the child*[29]) requires that the best interests of the child must be a 'primary' or 'of paramount' consideration in all actions concerning children.[30] At a Local Government level this principle would be best implemented using a more child centered approach that is advocated by the *Child Friendly Cities* network.[31]

Newell argues that in a Local Government context, the *best interests of the child* are difficult to gauge unless there is a process for "assessing the impact of actions."[32] Child impact assessment "involves assessing a proposed policy, decision or activity" in order to determine the effect it has on children and to ensure that the "best interests of the child become a primary consideration in all actions affecting the child."[33] Newell argues that this process of child impact assessment needs to be built into government processes from the earliest stages of policy development.[34]

In the report "Undertaking Child Impact Assessments in Aotearoa New Zealand Local Authorities", Dr Cindy Kiro, the Children's Commissioner argued that;[35]

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[28] Peter Newell "Child Advocacy in Local Government" (24 Novemeber, 1999) Presentation to Waitakere City Council, 6.
[29] Pauline Tapp and Nicola Taylor, "Protecting the Family" in Mark Henaghan & Bill Atkin (Eds) *Family Law Policy in New Zealand* (3rd Edition, LexisNexis, Wellington, 2007) 104-105, 300-302;also see Children and Young Persons Act 1974, s4.
[30]Pauline Tapp and Nicola Taylor, "Protecting the Family" in Mark Henaghan & Bill Atkin (Eds) *Family Law Policy in New Zealand* (3rd Edition, LexisNexis, Wellington, 2007) 104-105; Peter Newell "Child Advocacy in Local Government" (24 Novemeber, 1999) Presentation to Waitakere City Council, 5.
[31] UNICEF, "Building Child Friendly Cities: A Framework for Action"(UNICEF Innocenti Research Centre, Florence, 15 March 2004) http://www.childfriendlycities.org/pdf/cfc_booklet_eng.pdf (accessed 16th March, 2010); *also see* Sheridan Bartlett, Roger Hart, David Satterthwaite, Ximena de la Barra & Alfredo Missair, *Cities for Children: Children's Rights, Poverty and Urban Management* (UNICEF, Earthscan Publications Ltd, London, 1999; *also see* European City Network Cities for Children "Cities for Children strategy: A participative approach" http://www.citiesforchildren.eu/22.0.html (accessed 16th March, 2010);
[32] Peter Newell "Child Advocacy in Local Government" (24 November, 1999) Presentation to Waitakere City Council, 5.
[33] Nic Mason and Kirsten Hanna, "Undertaking Child Impact Assessments in Aotearoa New Zealand Local Authorities: Evidence, practice, ideas" A publication commissioned by the Office of Children's Commissioner, supported by UNICF NZ (Institute of Public Policy, AUT University, Auckland, February 2009) 3.
[34] Peter Newell "Child Advocacy in Local Government" (24 Novemeber, 1999) Presentation to Waitakere City Council, 5.
[35]Cindy Kiro "Foreword" in Nic Mason and Kirsten Hanna, "Undertaking Child Impact Assessments in Aotearoa New Zealand Local Authorities: Evidence, practice, ideas" A publication commissioned by the

> "*Bringing children into the centre of decision making makes a lot of sense. They are not only citizens for the future, but also citizens now. Yet their experience and views are seldom included in local government or government process.*"

In the same report Dennis McKinlay, the Executive Director of UNICEF NZ contends;[36]

> *"Local authorities are on the front line and with trends towards urbanization and government centralization they are primary actors in matters affecting children's lives. Human skills, knowledge, creativity and time, along with wisdom to use resources in the community effectively and appropriately, are basic to an effective child friendly approach"*

This same report suggests that the integration of children's issues and children's rights into Local Government framework is again not new; the most recent integration has been done through the Agenda for Children Implementation Plan.[37] This Agenda for Children is consistent with the concept of *Child Friendly Cities* which "*is equally applicable to governance of all communities which include children – large and small, urban and rural.*" Moreover, the Child Friendly Cities Framework is concerned with the "*implementation of the Convention on the Rights of the Child at the level where it has the greatest direct impact on children's lives.*"[38]

B Customary International Law

Customary International Law requires "a general and consistent State practice as well as a sense of legal obligation (*opinio juris sive necessitates*) to be deduced from the practice and behaviour of states."[39]

The United Nations General Assembly Resolution "A World Fit for Children" which is based on the direct input of the world's children and therefore consistent with the principles of UNCROC is an instrument that perpetuates the customary normative character of UNCROC.[40] The Resolution is like the Convention in that it was very widely accepted, but it also normative in character, not only does it recognise the views that are central to children and young people, it also resolves to implement and apply them;[41]

> *"We, the Governments participating in the special session, commit ourselves to implementing the Plan of Action through consideration of such measures as:*

Office of Children's Commissioner, supported by UNICF NZ (Institute of Public Policy, AUT University, Auckland, February 2009).

[36] Dennis McKinlay "Foreword" in Nic Mason and Kirsten Hanna, "Undertaking Child Impact Assessments in Aotearoa New Zealand Local Authorities: Evidence, practice, ideas" (A publication commissioned by the Office of Children's Commissioner, supported by UNICF NZ, Institute of Public Policy, AUT University, Auckland, February 2009).

[37] Ministry of Social Development, "Making it happen: implementing New Zealand's agenda for children" [2002] Institute of Public Policy, AUT University, Auckland. http://www.msd.govt.nz/publications/docs/agendaforchildren.pdf (accessed 20th November 2009).

[38] UNICEF, "Building Child Friendly Cities: A Framework for Action"(UNICEF Innocenti Research Centre, Florence, 15 March 2004) http://www.childfriendlycities.org/pdf/cfc_booklet_eng.pdf (accessed 16th March, 2010) 1.

[39] Justice Susan Glazebrook "Human Rights and the Environment" (2009) 40 VUWLR 293, 295.

[40] *A World Fit For Children* GA Res, S-27/2 A/RES/S-27/2, (11th October 2002) Para 31.

[41] *A World Fit For Children* GA Res, S-27/2 A/RES/S-27/2, (11th October 2002) Para 31.

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> *a) Putting in place, as appropriate, effective national legislation, policies and action plans and allocating resources to fulfil and protect the rights and to secure the wellbeing of children;*
> *b) Establishing or strengthening national bodies such as, inter alia, independent ombudspersons for children, where appropriate, or other institutions for the promotion and protection of the rights of the child;*
> *c) Developing national monitoring and evaluation systems to assess the impact of our actions on children;*
> *d) Enhancing widespread awareness and understanding of the rights of the child."*

Resolutions like this, which are arguably only declaratory of a strong resolve, not only serve to reinforce the emerging customary character of the principles of the UNCROC, they also serve to implement other principles and initiatives to further the Convention. This general acceptance of soft law contributes not only to a general consistent state practice when put into action, but also aids in establishing a sense of legal obligation or *opinio juris* which is necessary in the formation of international custom.

If the emerging customary normative status of the principles of the UNCROC is in question with a wide general practice and a real opinio juris still being uncertain, the status of at least the principle of the best interests of the child is clear, and arguably already binding as customary international law. In New Zealand the principle was enacted in the CYFS Act in 1974 which required that the interests of the child (or young person) be treated as the "first and paramount consideration".[42] Yet the Principle has existed in various forms and has been applied and enforced in various degrees a lot longer than that, and certainly longer than it was enshrined in the UNCROC twenty years ago. According to Henaghan, the principle was originally drafted in the House of Lords in July 1924, where one was to "*have regard solely to the welfare of the child*." This language was subsequently changed to '*first and paramount*' after [43] the principle was subsequently watered down, when the language was changed to *first and paramount,* only to be rescued again and strongly reapplied in the landmark House of Lords decision of *J v C*.[44]

The Lords in *J v C* ruled that the "child's welfare is the only relevant consideration, it is the "*first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed*."[45] This ruling is significant because as a House of Lords decision it is persuasive in other Commonwealth jurisdictions. New Zealand and Australia for example have a history of treating House of Lords rulings as being of the highest persuasiveness. The persuasiveness of House of Lords rulings also

[42] Children and Young Persons Act 1974, s4; *also see* Pauline Tapp and Nicola Taylor, "Protecting the Family" in Mark Henaghan & Bill Atkin (Eds) *Family Law Policy in New Zealand* (3rd Edition, LexisNexis, Wellington, 2007) 104.
[43] Mark Henaghan, "Legally Rearranging Families" in Mark Henaghan & Bill Atkin (Eds) *Family Law Policy in New Zealand* (3rd Edition, LexisNexis, Wellington, 2007) 302.
[44] Mark Henaghan, "Legally Rearranging Families" in Mark Henaghan & Bill Atkin (Eds) *Family Law Policy in New Zealand* (3rd Edition, LexisNexis, Wellington, 2007) 302.
[45] *J v C* [1970] AC 668 in Mark Henaghan, "Legally Rearranging Families" in Mark Henaghan & Bill Atkin (Eds) *Family Law Policy in New Zealand* (3rd Edition, LexisNexis, Wellington, 2007) 302.

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serves to perpetuate the principle in other Commonwealth jurisdictions as a Common Law principle. The *J v C* decision exists as strong evidence of the *principle of paramountcy of the child* being in the very least an example of an emerging customary international norm, given that since 1989 it has been enshrined (albeit in slightly different language) in one of the most widely ratified UN conventions; the UNCROC.

The wide global recognition and implementation of these principles, their normative nature and the fact that many of them have been applied for over 80 years in one form or the other add strength to the emerging international customary nature of the four general principles in the UNCROC. This status as emerging customary legal norms provides a certain pressure for states to make decisions that are consistent with those norms, or be seen to be in breach of international custom. This is even more so when New Zealand Courts have shown a propensity to interpret legislation consistent with international custom.[46]

LOCAL GOVERNMENT IN NEW ZEALAND

The orthodox position is that Local Governments are domestic bodies that are legislatively empowered to deliver local government,[47] and although they enjoy significant legislative and coercive powers, they are "controlled by central government legislation",[48] They are not representatives of the Crown [Central Government].[49] By not being the Crown or the State, Local Government is not subject to New Zealand's international treaty obligations unless the treaty has been incorporated into New Zealand Domestic law.

However some commentators contend that local government has a "quasi-constitutional significance'.[50] And even though it could be legislated away by an ordinary act of Parliament[51], it is part of the English system New Zealand inherited, predating even some of our Ministries. It is arguable that the Auckland Unitary Council which will soon be representative of 33% of New Zealand's population and at least 25% of New Zealand's children is certainly constitutionally significant.

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[46] Treasa Dunworth "Hidden Anxieties: Customary International Law in New Zealand" (2004) NZJPIL 67, 71.
[47] R.D. Mulholland, *Introduction to the New Zealand Legal System* (Brookers, Wellington, 1990) 35.
[48] Elaine Mossman and Pat Meyhew "Central Government Aims and Local Government Responses: The Prostitution Reform Act 2003" (2007, Ministry of Justice, Wellington) 15.
[49] *Hanton v Auckland City Council* [1994] NZRMA 289, 301.
[50] Christopher Mitchell & Dean R Knight, *The Laws of New Zealand/Local Government/Reissue 1*(Lexis Nexis Online, 2009) Para 30.
[51] Christopher Mitchell & Dean R Knight, *The Laws of New Zealand/Local Government/Reissue 1*(Lexis Nexis Online, 2009) Para 30.

The Department of Internal Affairs ("DIA") recognises that Local Government receives this empowerment from *three Acts*[52] but acknowledges that in its provision of local governance, Local Government is also subject to a further array of legislation that includes the Resource Management Act 1991.[53] It is UNICEF NZ's contention that the list does not stop here, and that in the provision of local governance, local governments are subject to New Zealand's international obligations in so far as they are obliged not to derogate from the principles by which New Zealand as a state is bound. Where national legislation is silent on any particular issue, local governments have the obligation not only consider International instruments like UNCROC but to make decisions that are consistent with them.

Furthermore UNICEF NZ contends that Local Government is not merely a 'subordinate body' like other statutory bodies, and this can be seen in the institution of a 'general competence' for the corporate powers of local authorities[54] in the 2002 Act, which according to Knight and Mitchell serves to "ameliorate the harshness of the prior ultra vires doctrine."[55] Yet it must be pointed out that before the 'general competence' provision in the 2002 Act, local authorities were 'very rarely inhibited' by the doctrine of ultra vires.[56] Local Governments are elected subject to the Local Electoral Act, they have coercive and legislative powers, they impose tax and they have the power to 'do acts and enter into transactions' 'wholly or principally for the benefit of its district or region.'[57] Local Government arguably has as much impact on any individual's life than Central Government, and arguably, in the case of children, even more.

The obligation to consider or to make decisions consistent with New Zealand's international obligations, and therefore with the UNCROC is not express in any of Local Government's empowering legislation, but this does not mean that an implied obligation does not exist. For the most part Central Government executive bodies do not have express statements of subjectivity to treaty law either. UNICEF NZ will show that local authorities have at the very least an obligation to consider New Zealand's unincorporated treaty obligations ("Mandatory Relevant Consideration")[58], but when

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[52] *See* Local Government Act (No 84) 2002, Local Electoral Act (No 35) 2001 and the Local Government (Rating) Act (No 6) 2002.

[53] DIA "Strategy for Evaluating Local Government Legislation" (2005) Department of Internal Affairs, Wellington, 1-50, 5.

[54] Local Government Act (No 84) 2002, s 12(2).

[55] Christopher Mitchell & Dean R Knight, *The Laws of New Zealand/Local Government/Reissue 1*(Lexis Nexis Online, 2009) Para 33.

[56] Jonathan Boston, John Martin, June Pallot & Pat Walsh, *Public Management: The New Zealand Model* (Oxford University Press, Melbourne, 2002) 167.

[57] Local Government Act (No 84) 2002, s.12(2).

[58] Claudia Geiringer "*Tavita* and all That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66, 67.

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interpreting legislation, they have an obligation to do so consistently with New Zealand's international treaty obligations ("Presumption of Consistent Interpretation")[59] – this is especially the case for the UNCROC which is under-implemented in New Zealand legislation[60]. UNICEF NZ contends that Local Government is at the very least an agent of Central Government - but moreover by its 'public function', the 'impact its decisions have on people, and the fact that in reality various executive bodies of Central Government have conceptions of Local Government as being intimately related to Central Government in that it governs and implements national policy at a local level - Local Government is subject just like the Central Government to unimplemented treaty obligations.

The Local Government Act is empowering rather than prescriptive[61], and so with that in mind one would be justified in making the leap that Parliament would not intend for the Local Government Act and other Local Government legislation for Local Governments to make decisions that bind their 'communities' without turning their mind to, and in many instances, even ignore the rights of children - rights that other executive bodies are bound to consider. Therefore UNICEF NZ contends further that the broad language of the Local Government Act 2002 and other empowering Local Government legislation requires the 'presumption of consistent interpretation' with unincorporated treaties like the UNCROC to fulfil the purpose of Local Government which is to provide Local Government with the scope required to fulfil its purpose; democratic local decision-making and action by, and on behalf of, its communities;[62] and the promotion of the social, economic, environmental, and cultural well-being of its communities.

A Agency

Local Government is subject to the '*Presumption of Consistent Interpretation'* ("the presumption") of unincorporated treaties like UNCROC as they are at the very least, agents of Central Government.

Tama Potaka raised the argument whether local government was an agent of the central government in a Treaty of Waitangi context, maintaining that it was

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[59] Claudia Geiringer "*Tavita* and all That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66, 67.
[60] Robert Ludbrook "UNCROC at 20: Robert Ludbrook on UNCROC" (2 November 2009) http://www.unicef.org.nz/page/326/RobertLudbrookonUNCROC.html (accessed 20th November, 2009).
[61] Ministry for Culture and Heritage "Cultural Well-Being and Local Government Report 1: Definitions and Contexts of Cultural Well-being" http://www.culturalwellbeing.govt.nz/files/report1.pdf (accessed 18/02/2010).
[62] Local Government Act (No 84) 2002, s.10.

unclear.[63] He argued that the adoption of a '*control*' test for Crown agency by the High Court in *Miller*[64] - that is "the entity is substantively controlled by central government"[65] – suggested that Local Government was not a crown agent, since in New Zealand local government is devolved from central government control.[66] This control test looks at commercial practice and asks whether the body has a commercial function (even when exercising a public function); if it does it is not taken to be part of the Crown.[67] However this enquiry may not be so applicable today, where many government bodies have been decentralised or devolved in order to be more commercially effective. The Local Government Act 2002 represents increased devolution to Local Government bodies and increased general competence. Does this lack of Central Government *control* effectively take Local Government off the hook? It is arguable that the power of general competence in the 2002 Act was devolved to Local Governments so as to enable them to raise funds in the face of ratepayer and more importantly, Central Government reluctance to provide them.[68] Furthermore this general competence is limited 'wholly or principally for the benefit of its district or region.'[69]

Potaka contends that the devolution from Central Government control makes Local Governments more a crown agent under the *functional* test – "*where a body is exercising authority that was traditionally part of the general executive authority of government then it is a crown agent*".[70] Boston et al, contend that in the Local Government context, many of the functions previously undertaken by Central Government have already been transferred to Local Government, these include resource management, transport, crime prevention and recreation and sport.[71]

The tests used by the Court for amenability to judicial review of certain decision makers, are also indicative of whether a body has a *public function* and exercises powers that were traditionally part of the Central Government, thereby making it an agent of Government.

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[63] Tama Potaka "A Treaty Agendum for Local Government" (1999) 29 VUWLR 111, 124.
[64] Miller v New Zealand Railway Corporation (18 February 1993) unreported, High Court, Wellington, AP 61/92.
[65] Tama Potaka "A Treaty Agendum for Local Government" (1999) 29 VUWLR 111, 124.
[66] Ibid, 125.
[67] Tama Potaka "A Treaty Agendum for Local Government" (1999) 29 VUWLR 111, 124; See *Waitakere City Council v Housing Corporation of New Zealand* [1992] 3 NZLR 591.
[68] Jonathan Boston, John Martin, June Pallot & Pat Walsh, *Public Management: The New Zealand Model* (Oxford University Press, Melbourne, 2002) 167.
[69] Local Government Act (No 84) 2002, s.12 (2).
[70] Tama Potaka "A Treaty Agendum for Local Government" (1999) 29 VUWLR 111, 124.
[71] Jonathan Boston, John Martin, June Pallot & Pat Walsh, *Public Management: The New Zealand Model* (Oxford University Press, Melbourne, 2002) 168.

In *Phipps* the court held that they should be focused on issues of substance, stating that;[72]

> "*... over recent decades Courts have increasingly been willing to review exercises of power which in substance are public or have important public consequences, however their origins and the persons or bodies exercising them might be characterised.*"

This test places emphasis on the 'important public consequences' or the *impact* a decision making body has on the public affected by the decision. This impact test is directly applicable to Local Government whose decisions have a direct impact on the local population. The impact of Local Government on children and young people is even greater, since they are unable to vote, or serve on Councils. So 'the presumption' consistent with the UNCROC is even more justified.

In *Dunne* when ascertaining whether a body was susceptible to judicial view the High Court considered both the 'impact' test from *Phipps* and applied the '*function*' test[73]. When inquiring into reviewability Justice Young held;[74]

> "*Review is not limited to public bodies exercising statutory functions. It is concerned with bodies performing what are essentially public functions or the exercise of public powers.*"

Although a Court will very rarely intervene in decisions by local authority acting within the scope of its discretionary power and function it will if a decision is illegal, irrational and unreasonable or subject to procedural impropriety.[75] Recent Court decisions show a deference to the "democratic function of local authorities to be able to govern in the interests of the public and community," also Courts tend to take a "hard look" approach to "institutional competence" and the benefit of the doubt will be given in favour of the persons affected.[76] The scope of local authority legislation is broad, the justification for increased deference to be given to the local government democratic process. It is arguable that Local authority decisions that derogate from rights protected in the UNCROC could be found to be procedurally unsound. Justice Young did mention in *Dunne* that the Courts are "anxious to protect fundamental rights."[77]

The New Zealand Bill of Rights Act ("NZBORA") applies the 'public function' test to ascertain whether actions fall under the Act;[78]

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[72] Ibid, 11.
[73] *Dunne v CanWest TV Works Ltd* [2005] NZAR 577 (HC) Young J.
[74] Ibid, 583.
[75] Derek Nolan, *Environmental and Resource Management Law* (3rd Edition, Lexis Nexis NZ, Wellington, 2005) 50.
[76] Derek Nolan, *Environmental and Resource Management Law* (3rd Edition, Lexis Nexis NZ, Wellington, 2005) 50.
[77] *Dunne v CanWest TV Works Ltd* [2005] NZAR 577 (HC) Young J, 586.
[78] New Zealand Bill of Rights Act (No 109) 1990, **s** 3**.**

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This Bill of Rights 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.

Local Government is captured under limb (b) as it exercises a public function that is pursuant to law. This section seems to underplay the importance of Local Government because it distinguishes it from Central Governmental bodies that are captured in limb (a). However the LGA in regulating bylaws provides a more accurate picture of the special position Local Government has in the New Zealand governance, by providing an extra subjectivity to NZBORA; "No bylaw may be made which is inconsistent with the NZBORA."[79]

Local Government occupies a unique position in the New Zealand Government framework – it is not part of the legislative, executive, or judicial branches of the government but nor is it a mere statutory body. At its very least it is clear that it is an agent of Government. As an Agent of Government the obligation to act consistently with New Zealand's international rights obligations is clear given local government's public governance function, the impact of its decisions on the general population, its law-making ability and its special subjectivity to NZBORA. However it is also arguable that Local Government in New Zealand has a relationship with Central Government that is more intimate than a mere agent. Although this relationship is not one of law, it is one of fact.

From an international law viewpoint it is quite clear that local authorities are a branch of the state and so the requirement to for local authorities to comply with the State's international obligations is a real one.[80] Non-compliance could result in a breach of the State's international obligations. The ILC Draft articles on Responsibility of States, attributes of conduct to a State;[81]

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

[79] New Zealand Bill of Rights Act (No 109) 1990, **s** 155(3)**.**
[80] Alberto Costi, "Personal Communication" (November 2009) Associate Professor of Law, Victoria University of Wellington.
[81] Draft articles on Responsibility of States for Internationally Wrongful Acts (*International Law Commission*, *Fifty-sixth session, Supplement No. 10* (A/56/10), chp.IV.E.1, November 2001) Article 4.

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This article unequivocally attributes State liability to the wrongful actions of a body within a State, and explicitly mentions the responsibility of a State for a 'territorial unit' of that State.

B Central Government Conceptions of Local Government

At the Local Government New Zealand Annual Conference in 2007 John Key, then Leader of the Opposition, in his speech recognised the significance of Local Government in the New Constitutional Framework;[82]

> "*…central government and local government are both major players in the New Zealand economy and in New Zealand society. What we do actually matters in people's lives.*"

John Key indicated albeit implicitly, that both Central Government and Local Government share a relationship somewhat similar to a partnership, yet it is clear from his language that this partnership is one of *senior partner* and *junior partner*; [83]

> "*We [Central Government and Local Government] share responsibility for infrastructure, so we want to see a shared basis on which to make sound infrastructure investment decisions. We don't want to have different rules, different constraints, and different considerations applying to central government compared to local government investment. This process will involve working together through a range of pricing, regulation and financing issues to ensure the infrastructure we need gets built and gets built in time. My intention would be to offer local government a broader range of tools which can be used to address the needs of local communities. These options could involve increased use of partnerships, charging arrangements and longer-term financing.*"

The Department of Internal Affairs ("DIA") defines its relationship with Local Government as akin to that of a 'partnership'.[84] The DIA acknowledges that Local Government is essential for delivering 'national goals and priorities', and it also acknowledges that local government is reliant on Central Government for its existence and powers, which through the enactment of the Local Government Act 2002 are broad in order to provide "effective and responsive local governance"[85] in order to further

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[82] John Key - *Speech to Local Government New Zealand Annual Conference 2007* http://www.johnkey.co.nz/index.php?/archives/178-SPEECH-On-local-government.html (accessed 23/9/09)
[83] John Key - *Speech to Local Government New Zealand Annual Conference 2007* http://www.johnkey.co.nz/index.php?/archives/178-SPEECH-On-local-government.html (accessed 23/9/09)
[84] Dept. of Internal Affairs "Policy Development Guidelines for Regulatory Functions Involving Local Government" (December 2006) http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Resource-material-Our-Policy-Advice-Areas-Policy-development-guidelines-for-regulatory-functions-involving-local-government?OpenDocument (accessed 22/02/2010), 6.
[85] Dept. of Internal Affairs "Policy Development Guidelines for Regulatory Functions Involving Local Government" (December 2006) http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Resource-material-Our-Policy-Advice-Areas-Policy-development-guidelines-for-regulatory-functions-involving-local-government?OpenDocument (accessed 22/02/2010), 6.

the purpose of local government, which apart from providing *democratic local decision-making and action by and on behalf of communities, and to promoting the social, economic, environmental and cultural wellbeing of communities in the present and for the future,*[86] includes the implementation of central government initiatives.

A '*partnership*' presupposes a horizontal relationship, where each partner has in stake in the other. This conception of Local Government views Local Government as a '*junior partner'* in New Zealand's constitutional framework, which not only plays an essential role in the implementation of national policy, but arguably should be 'in' on the creation of it.[87] This is consistent with Local Government New Zealand ("LGNZ") assertion that "there has been a shift in local government towards growth planning that is more collaborative."[88]

Rather than partnership, Guerin suggests that the relationship between Central Government and Local Government could be one of subsidiarity.[89] Guerin defines 'subsidiarity' as a central authority having a subsidiarity function to make decisions that cannot be taken at a local level.[90] The subsidiarity principle imposes a vertical relationship between the local and central governments, with the former having the full competence to make local decisions subject to legislative constraints. This does seem in keeping with the general conception of Local Government in New Zealand in relation to Central Government.

Guerin contrasts the New Zealand constitutional framework with that of the USA and Australia where a subsidiarity framework is constitutional and, with Europe, that operates under the principle of subsidiarity.[91] New Zealand has no written constitutional recognition of the principle of subsidiarity, but this by no means precludes its existence. In practice interactions between local governments and central government seem to be on a subsidiarity basis. Further indication of a subsidiarity relationship can be seen in the way tensions arise between Local Government and

[86] Local Government Act (No 84) 2002, s.10.
[87] Dept. of Internal Affairs "Policy Development Guidelines for Regulatory Functions Involving Local Government" (December 2006) http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Resource-material-Our-Policy-Advice-Areas-Policy-development-guidelines-for-regulatory-functions-involving-local-government?OpenDocument (accessed 22/02/2010).
[88] LGNZ "Submission to the Department of Internal Affairs on the Building Sustainable Urban Communities: Discussion Document from Local Government New Zealand" (2008) Local Government New Zealand, Wellington, 7.
[89] Kevin Guerin, "Subsidiarity: Implications for New Zealand" (New Zealand Treasury Working Paper, series 02/03, March 2002) 11-12.
[90] Kevin Guerin, "Subsidiarity: Implications for New Zealand" (New Zealand Treasury Working Paper, series 02/03, March 2002) 1.
[91] Kevin Guerin, "Subsidiarity: Implications for New Zealand" (New Zealand Treasury Working Paper, series 02/03, March 2002) 13.

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Central Government. Local Governments are elected to govern locally and Central Government is elected to govern nationally and the requirements of each don't always inter-connect. For example, pursuant to the LGA, local governments are required to do extensive community consultation before they pass a bylaw and are arguably well placed to deflect Central Government initiatives that are contrary to the needs of their communities.[92] Recently the principle of subsidiarity has been included the new legislation for the Auckland 'Super-City' Council framework, where the Auckland City Governing body exercises a subsidiarity function over decisions that affect Auckland as a whole.[93]

Both of these conceptions of Local Government by Central Government bodies acknowledge the significant constitutional role Local Government plays in New Zealand Government. But more importantly these two conceptions provide factual recognition and acknowledgement of Local Government as playing a fundamental role in the governance of New Zealand; Local Government works closely with certain Central Government bodies, and implements Central Governmental policy at a local level. It is not a stretch to reach the conclusion that as one is subject to New Zealand's International obligations including the UNCROC, so too should the other.

LOCAL GOVERNMENT LEGISLATION

Local Government empowering legislation especially the Local Government Act is widely drafted in order to give effect to its purpose, which is to "provide for democratic and effective local government that recognises the diversity of New Zealand communities."[94] Furthermore, they are empowered to pursue any social, economic, environmental or cultural initiative fettered only by the requirement to do so in the context of 'sustainable urban development'.[95] For this reason, "local government is regarded as being more than a mere provider of services, and can be contrasted with other sub-national bodies which simply deliver services on behalf of central government."[96]

A The Local Government Act 2002

It is UNICEF NZ's position that the LGA (and the RMA) is not only drafted widely enough to include obligations to provide for children's rights but the language

[92] Elaine Mossman and Pat Meyhew "Central Government Aims and Local Government Responses: The Prostitution Reform Act 2003" (2007, Ministry of Justice, Wellington) 17.
[93] Local Government (Auckland Council) Act (No 32) 2009, s 17(2).
[94] Local Government Act (No 84) 2002, s 3.
[95] Local Government Act (No 84) 2002, s 3(d).
[96] Christopher Mitchell & Dean R Knight, *The Laws of New Zealand/Local Government/Reissue 1*(Laws of New Zealand, Lexis Nexis Online, 2009) Para 28.

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in both the LGA and the RMA, is broad and principle based and wants the ‘presumption’ to make the UNCROC applicable and ensure adequate provision for children’s rights. This language can be found in both the purpose and principle provisions of both Acts.

1 Purpose of Local Government

Section 3 set out the purpose of the LGA;[97]

> The purpose of this Act is to provide for democratic and effective local government that recognises the diversity of New Zealand communities; and, to that end, this Act—
>
> (a) states the purpose of local government; and
> (b) provides a framework and powers for local authorities to decide which activities they undertake and the manner in which they will undertake them; and
> (c) promotes the accountability of local authorities to their communities; and
> (d) provides for local authorities to play a broad role in promoting the social, economic, environmental, and cultural well-being of their communities, taking a sustainable development approach.

However this purpose has to be read along with section 10 that outlines the purpose of Local Government in New Zealand; The purpose of local government is—[98]

> (a) to enable democratic local decision-making and action by, and on behalf of, *communities*; and
> (b) to promote the *social, economic, environmental, and cultural well-being of communities*, in the present and for the future.

2 Principles Relating to Local Government

Local Government is required to act in accordance with certain statutory principles. These principles are central to achieving the purpose of the act, and are integral in the Local Government decision-making, planning and bylaw making process. This principles outlined in the LGA include ;[99]

- A local authority should take account of the views of its community;[100]
- when making decisions, a local authority should take account of – [101]
  (i) the diversity of the community and its interests,

[97] Local Government Act (No 84) 2002, s 3.
[98] Local Government Act (No 84) 2002, s 10.
[99] Local Government Act (No 84) 2002, s.14.
[100] Ibid, s 14(1)(b). See also s 78.
[101] Ibid, s 14(1)(c). See also s 77.

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(ii) the interests of future and current communities; and

- (iii) the impact the decision has on the social, economic, and cultural well-being of the communities; when making a decision, a local authority should take account of—[102]
  (i) the diversity of the community, and the community's interests, within its district or region; and
  (ii) the interests of future as well as current communities; and
  (iii) the likely impact of any decision on each aspect of well-being referred to in section 10:
- a local authority should ensure prudent stewardship and efficient and effective use of its resources in the interest of their community;[103]
- in taking a sustainable development approach, a local authority should take into account—[104]
  (i) the social, economic, and cultural well-being of people and communities; and
  (ii) the need to maintain and enhance the quality of the environment; and
  (iii) the reasonably foreseeable needs of future generations.

Sub-section 2 addresses the conflict with any of these principles and the purpose of Local Government outlined in section 10, and requires the local authority to resolve the conflict in accordance with the principle in subsection (1)(a)(i).[105] More codified guidelines as to how local decision making should be undertaken is not really provided in the LGA – but it does require each local authority to *'promote compliance'* with sections 76-82.[106] LGNZ lists a number of effects of decision-making that is pursuant to the LGA, and contends that good decision making should;[107]

- involve consideration of all reasonably practical options;
- involve consideration of the views of persons likely to be affected by a decision;
- identify any significant inconsistency between the decision and any policy or plan adopted by a LA and;
- promote compliance with the principles of consultation, including giving interested persons a reasonable opportunity to present their views.

Furthermore the LGA requires Local Governments to consult with their local communities and other Crown Agencies in the formation of 'community outcomes'[108]

[102] Ibid, s 14(1)(d). See also s 78.
[103] Ibid, s 14(1)(g).
[104] Local Government Act (No 84) 2002, s 14(1)(h).
[105] Local Government Act (No 84) 2002, s 14(2).
[106] LGNZ "The Local Government Act 2002: What does it mean for Community Boards?" (2003) Local Government New Zealand, Wellington, 9.
[107] LGNZ "The Local Government Act 2002: What does it mean for Community Boards?" (2003) Local Government New Zealand, Wellington, 9.
[108] Local Government Act (No 84) 2002, ss 76-82.

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and bylaws[109]. The decision making and consultation principles of the LGA are designed to apply where no requirements are specified in other relevant local government legislation.[110]

Bylaws subject local communities to Local Government regulation, and because of this the LGA requires extensive consultation by Local Governments with their communities. A local authority is required to consult the community through the special consultative procedure when making, amending or reviewing a bylaw.[111] What if a decision or even a bylaw is inconsistent with the UNCROC. According to Knight, there is nothing stopping a any person [on behalf of a child or young person] filing an application to the High Court for judicial review of a bylaw under s12(1) of the Bylaws Act 1910 challenging its validity.[112] The claimant could maintain that a certain bylaw has an impact on children or young people, and derogates from rights expressly provided for children in the UNCROC. They could claim that they weren't adequately consulted, the bylaw was not '*the most appropriate way of addressing the perceived problem*'[113] because it derogated from the rights guaranteed in the UNCROC or were denied the opportunity to participate in the formation of the bylaw; both rights guaranteed in article 12 of the UNCROC.[114]

These effects when read consistently with the UNCROC should reveal the 'best interests of the child approach'[115] which is central to the UNCROC and an emerging principle of customary international law, which requires child participation and non-discrimination.[116]

3 'Communities'

Both of these sections set out a purpose that is broad in scope and empowers local government to "provide for democratic and effective local government in New Zealand."[117] However it must be noted that local government must recognise the diversity of New Zealand '*communities*'. The notion of '*communities*' arguably exists in the section 10(a) LGA in its broadest and most abstract dimension.

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[109] Local Government Act (No 84) 2002, ss 155-156.
[110] Quality Planning "Relationship between the Local Government Act 2002 and the RMA" http://www.qualityplanning.org.nz/related-laws/faq-rma-lga.php (accessed 02/03/2010).
[111] Local Government Act (No 84) 2002, s.156(1).
[112] Dean Knight "Power to Make Bylaws" NZLJ [2005] 165, 165.
[113] Local Government Act (No 84) 2002, ss 155(1).
[114] UNCROC (20 November 1989) 1577 UNTS 3, Article 12.
[115] UNCROC (20 November 1989) 1577 UNTS 3, art 3.
[116] Peter Newell "Child Advocacy in Local Government" (24 November 1999) Address to Waitakere City Council, 4-5.
[117] *Carter Holt Harvey Ltd v North Shore City Council* [2006] 2 NZLR 787, para 36.

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Communities in the Act are flexible and are best defined as a concept where interests in common and priorities are engendered within and by a group of people rather than an agenda being imposed on them – which would be more of a bureaucratic model. Under the LGA Communities are distinct from Local Government.

Children and young people are often underrepresented in local government decision making which is not only inconsistent with the UNCROC which protects the right of children and young persons to be consulted and participate in 'community outcomes',[118] but also the LGA[119] - imposing a decision on children and young people, is contrary not only to the conception of community but also to the requirements of the LGA that require community outcomes '*by or on behalf of those communities.*'[120] It is therefore contrary to Parliament's intention to make decisions or impose an outcome on children and young people when there is an express requirement to initiate an outcome on their behalf, yet this is what often happens.

Section 10(b) LGA arguably expresses a slightly narrower, more geographic centred conception of Communities. Local authorities are required to promote the *social, economic, environmental, and cultural well-being of communities.*.[121] Implied in this section 10(b) is that idea that *communities* consist of *"the area to which one feels a sense of belonging and to which one looks for social, service and economic support*"[122] This 'sense of belonging' relates to the social dimension of community,[123] but arguably has cross over into economic, environmental and the cultural dimensions of community as well. LGNZ have identified a list of factors that identify a sense of community identity and belonging;[124]

- Similarities in the demographic, socio economic and/or ethnic characteristics.
- Similarities in economic activities.
- Dependence on shared facilities such as schools, recreation/cultural facilities and retail outlets.
- Physical and topographical features.

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[118] United Nations Convention on the Rights of the Child ("UNCROC") (20 November 1989) 1577 UNTS 3, art 12; also see the Preamble of UNCROC; "…*Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community*."

[119] See Local Government Act (No 84) 2002, ss 10, 76-82.

[120] Local Government Act (No 84) 2002, s 10(a).

[121] Local Government Act (No 84) 2002, s 10(b).

[122] LGNZ "The Local Government Act 2002: What does it mean for Community Boards?" (2003) Local Government New Zealand, Wellington, 9.

[123] Jonathan Boston, John Martin, June Pallot & Pat Walsh, *Public Management: The New Zealand Model* (Oxford University Press, Melbourne, 2002)165.

[124] LGNZ "The Local Government Act 2002: What does it mean for Community Boards?" (2003) Local Government New Zealand, Wellington, 9.

- The history of the area.
- Transport and communication links.

All of these factors have a direct impact on children and young people who are not only members of families within a community, but also make up a certain demographic of their communities themselves. Children are particularly vulnerable; they have different needs, and respond differently to community factors than other members of their communities.[125]

The UNCROC recognises and has made provision for the special needs of children. An example of the protection of social wellbeing in the children's rights context is Article 15 which provides the fundamental civil right of children to engage in peaceful activities as a group – and further maintains that this right can only be impeded by express statutory language.[126] This right involves the provision of requisite infrastructure and facilities that meet children's needs; things that can only be provided by local government, yet Central Government signed up to the obligation. It is not tenable for local government to proceed as if the UNCROC does not apply when, at least implicitly, it does.

4 'Sustainable Development'

According to Mitchell and Knight, "local government is regarded as being more than a mere provider of services, and can be contrasted with other sub-national bodies which simply deliver services on behalf of central government."[127] Under section 3 LGA are empowered to pursue any social, economic, environmental or cultural initiative fettered only by the requirement to do so in the context of '*sustainable development*'.

The principle of 'sustainable development' features centrally in both the statutory purposes of the RMA[128] and the LGA[129] Where the RMA is express about applying the principle of sustainability, defining it as *sustainable management* as "*managing the use, development, and protection of natural and physical resources in a*

[125] Sheridan Bartlett, Roger Hart, David Satterthwaite, Ximena de la Barra & Alfredo Missair, *Cities for Children: Children's Rights, Poverty and Urban Management* (UNICEF, Earthscan Publications Ltd, London, 1999).
[126] Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (3rd Ed, UNICEF Regional Office for Europe, Switzerland, 2007) 200.
[127] Christopher Mitchell & Dean R Knight, *The Laws of New Zealand/Local Government/Reissue 1*(Lexis Nexis Online, 2009) Para 28.
[128] Resource Management Act (No 69) 1991, s. 5(2).
[129] Local Government Act (No 84) 2002, s.3(d)

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way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety,"[130] while the LGA's approach "*provides for local authorities to play a broad role in promoting the social, economic, environmental, and cultural well-being of their communities, taking a sustainable development approach*."[131]

The LGA requires Local Government in performing its sustainable development approach is described in LGA as:

> (h) in taking a sustainable development approach, a local authority should take into account—[132]
>
> > (i) the social, economic, and cultural well-being of people and communities; and
> > (ii) the need to maintain and enhance the quality of the environment; and
> > (iii) the reasonably foreseeable needs of future generations.

There is a natural convergence between principles of sustainable development and children's rights.[133] The interrelationship between sustainable development and children's rights was first articulated in the 'Plan of Action from the 1990 World Summit for Children' and in the 'Agenda 21 Action Plan which was endorsed by the 1992 Rio de Janeiro Earth Summit'.[134] The World Summit on Sustainable Development held in Johannesburg ("WSSD") in 2002, reiterated and built upon the principle of sustainable development, acknowledging the intimate relationship between sustainable development and children's' rights, especially on addressing issues of poverty eradication, health and education.[135] In all of these plans of action children are acknowledged as having the greatest stake in the application of sustainable development, because these processes affect their lives today and have implications for their futures.[136]

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[130] Resource Management Act (No 69) 1991, s. 5(2).
[131] Local Government Act (No 84) 2002, s.3(d)
[132] Local Government Act (No 84) 2002, s 14(1)(h).
[133] Sheridan Bartlett, Roger Hart, David Satterthwaite, Ximena de la Barra & Alfredo Missair, *Cities for Children: Children's Rights, Poverty and Urban Management* (UNICEF, Earthscan Publications Ltd, London, 1999) 16.
[134] Sheridan Bartlett, Roger Hart, David Satterthwaite, Ximena de la Barra & Alfredo Missair, *Cities for Children: Children's Rights, Poverty and Urban Management* (UNICEF, Earthscan Publications Ltd, London, 1999), 17.
[135] Bhaskar Nath, "Education for Sustainable Development: The Johannesburg Summit and Beyond" (2003) Environment, Development and Sustainability 5(2): 231–254.
[136] Ibid.

In the context of participation and consultation of children, Principle 21 of the 1992 United Nations Conference on Environment and Development – Rio Declaration states that;[137]

> "*The creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all.*"

The Agenda 21, Chapter25 objectives state that;[138]

> "*The specific interests of children need to be taken fully into account in the participatory process on environment and development in order to safeguard the future sustainability of any actions taken to improve the environment...*"

Governments should take active steps to;[139]

> "*Establish procedures to incorporate children's concerns into all relevant policies and strategies for environment and development at the local, regional and national levels, `recreation needs, and control of pollution and toxicity in both rural and urban areas.*"
> (Agenda 21, chapter25, Objectives)

The WSSD produced the *Johannesburg Declaration on Sustainable Development*, which is a non-binding declaration asserting an commitment by states parties to work towards greater sustainability, and the *Johannesburg Plan of Implementation* ("JPI") which outline the commitment of states parties to fully implement Agenda 21.[140] Both the Declaration and the JPI attack children's issues head on, including education, health and employment issues.[141] The declaration uses a broad based, multilayered approach to sustainable development;[142]

> "*We recognize that sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels. As social partners, we will continue to work for stable partnerships with all major groups, respecting the independent, important roles of each of them.*"

This article clearly includes local government which is argued by Verchick who not only addresses the advantages local government has in implementing sustainable development, but also that they need to do it with support of Central Government.[143]

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[137] Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (3rd Ed, UNICEF Regional Office for Europe, Switzerland, 2007) 168.
[138] Ibid.
[139] Ibid.
[140] Bhaskar Nath, "Education for Sustainable Development: The Johannesburg Summit and Beyond" (2003) Environment, Development and Sustainability 5(2): 231–254, 232.
[141] Population Council "The Johannesburg Summit on Health and Sustainable Development" (Dec. 2002) 28 Population and Development Review, No. 4, 817-820.
[142] Johannesburg Declaration on Sustainable Development A/CONF.199/L.6/Rev.2 (4 September 2002) ("Declaration") http://Johannesburgsummit.org/html/documents/summit_docs.html (accessed 6/3/2010) Article 26.
[143] Robert R.M. Verchick, "Why the Global Environment Needs Local Government: Lessons from the Johannesburg Summit" (2003) 35 Urb. Law. 471.

Evidence of New Zealand's commitment to Sustainable Development can be seen in the language used in both the LGA and the RMA. The use of the language 'future generations' refers to our descendants and in this regard is consistent with the principles of 'kaitiakitanga'[144] and the 'ethic of stewardship'[145] that are outlined in the RMA. Yet the 'future generations' language is also an express acknowledgement of the increased stake children have in sustainable management in New Zealand.[146]

The broad principle based language of the LGA and RMA, is indicative of a parliamentary intention for Local Government to include substantive rights in their decision making. If a positive duty on local government to make decisions consistent with children's rights is not clear in the language of the statute law, the obligation to avoid breaching children's rights is sufficiently clear. Furthermore, where it can be argued that the language of the local government legislation is widely drafted to provide for the protection of substantive rights generally, the UNCROC provides for children specifically. This provides Local Government with a stronger obligation to decide consistently with the UNCROC itself.

The UNCROC addresses issues that specifically affect children, and protects children's rights within a framework of family rights and responsibilities.[147] Given this, the inclusion of wide provisions designed to include all of New Zealand's rights obligations, ironically misses obligations that are specific, notably article 12 that requires children to be specifically included in decision making that concerns them;[148]

> *1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
> *2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

This article 12 right is specific, and differs from article 19(1) of the International Covenant on Civil and Political Rights ('ICCPR')[149] which states that "Everyone shall have the right to hold opinions without interference" or the International Covenant on Economic, Social and Cultural Rights ('ICESCR') which establishes the protection of peoples to freely pursue their economic, social and cultural development[150] or article 19 of the Universal Declaration of Human Rights ('UDHR') which states that

[144] Resource Management Act (No 69) 1991, s. 7(a).
[145] Ibid, s. 7(aa).
[146] Local Government Act (No 84) 2002, s.14(1)(h).
[147] UNCROC (20 November 1989) 1577 UNTS 3, Article 5.
[148] UNCROC (20 November 1989) 1577 UNTS 3, Article 12.
[149] International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171.
[150] International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3.

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"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 12 of the UNCROC is specific because it requires that "children should be assured the right to express their views freely, but also that they should be heard and that their views be given due weight".[151] Furthermore the Committee further emphasizes that on top of their views being given due weight, "children must be made aware of their right."[152]

The UN Child Rights Committee which has the authority to receive national reports and to make recommendations,[153] has also made an express indication in the UNCROC Implementation Guide that child participation extends to local government decision-making.[154] The UN Child Rights Committee encourages the participation of children "in the planning, implementation and monitoring of local services"[155] The report of the Second United Nations Conference on Human Settlements (Habitat II) states that –
"*Special attention needs to be paid to the participatory processes dealing with the shaping of cities, towns and neighbourhoods; this is in order to secure the living conditions of children and of youth and to make use of their insight, creativity and thoughts on the environment"*[156]

The applicability the 'mandatory relevant consideration' of New Zealand's unimplemented treaty obligations to local government is a not a radical proposition at all, given its quasi-constitutional status and its intimate relationship with Central Government. However given the purpose and scope of Local Government in New Zealand, the broad principle based language of the LGA and the principles by which this Local Government is to be provided the 'presumption of consistent interpretation' with New Zealand's international treaty obligations is a better approach. Children and young people - who make up a significant portion of local populations - are underrepresented in Local Government empowering legislation. The application of the 'presumption' to international instruments like UNCROC, would further the purpose of

[151] United Nations Conference on Human Settlements (Habitat II), A/CONF.165/14, p. 15 in Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (3rd Ed, UNICEF Regional Office for Europe,Switzerland, 2007) 150
[152] Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (3rd Ed, UNICEF Regional Office for Europe,Switzerland, 2007) 152
[153] Sarah Pitchard *Indigenous People, United Nations and Human* Rights (1998 Zed Books, The Federation Press, Australia) 24.
[154] Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (3rd Ed, UNICEF Regional Office for Europe,Switzerland, 2007) 164.
[155] Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (3rd Ed, UNICEF Regional Office for Europe,Switzerland, 2007) 164.
[156] Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (3rd Ed, UNICEF Regional Office for Europe,Switzerland, 2007) 164.

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the LGA by recognising the rights of children, young people and their families an under-represented, but foundational component of the 'community'. This proposition is further buttressed by the recognition of Local Government at International Law[157] and with Local Government being included the UNCROC implementation guide as one of the bodies required to implement its principles.[158]

B The LGACA – Establishing the Auckland 'Super-city' Unitary Council

The recent Local Government (Auckland Council) Act ("LGACA")[159] established one super-sized Auckland Unitary Council which has a profound effect on of the 'Super-city's' many children.

The LGACA governance model is based on the principle of subsidiarity, and democratic accountability.[160] In the context of increased democratic accountability this governance model places considerable weight on the importance of community boards as a conduit by which local people can have real input into decision making. However under the Local Electoral Act only enrolled voters qualify for election to a community board (persons over the age of 18 years).[161] This means that children under 18 are precluded from having any active participation in issues that affect them in Auckland City decision-making.[162] This is inconsistent with article 12 of UNCROC which requires the participation of children in the decision-making process on issues that impact of them.

It was UNICEF NZ's submission to the Auckland Unitary Council Framework should include a Children's Issues Desk or an Office for Children or some other mechanism that serves to address children's issues specifically as a way of maintaining compliance with the UNCROC, and especially Article 12 at the local government level, by ensuring child participation.[163] This would be more in line with the increased democratic accountability required by the LGACA.

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157 Draft articles on Responsibility of States for Internationally Wrongful Acts (*International Law Commission, Fifty-sixth session, Supplement No. 10* (A/56/10), chp.IV.E.1, November 2001) Article 4.
158 Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (3rd Ed, UNICEF Regional Office for Europe,Switzerland, 2007).
159 Local Government (Auckland Council) Act (No 32) 2009.
160 Local Government (Auckland Council) Act (No 32) 2009, s 14(2).
161 Local Electoral Act 2001 (No 35) ss 19F, 19G, 19J & 19W.
162 Robert Ludbrook - Personal Communication (25th November 2009).
163 See UNICEF "The United Nations Convention on the Rights of the Child (UNCROC) and Local Government in New Zealand: The legitimisation of UNCROC at Local Government Level" (*Feedback to Auckland Transition Agency on the* Discussion Document – Organisational Structure and Staff Transition 2 November 2009) http://www.unicef.org.nz/store/doc/RelationshipbetweenUNCROCandAKLCouncil.doc (accessed 06/03/2010).

It is arguable that the obligation to provide for children's rights is for the Auckland Governing Body because children's rights are the same for all children. However there are other obligations under the UNCROC that might be decided by Auckland local bodies. Some of these locally based obligations might include the provision and maintaining of recreational areas which is an obligation under Article 31 to provide for a child's rights to rest, leisure, play and recreational activities and to participate in cultural and artistic life,[164] or another might be the provision of disability facilities in certain local areas which is an obligation under Article 23 to provide children with disabilities with conditions for living that "promote self-reliance "and facilitate "active participation in the community".[165]

The applicability the 'mandatory relevant consideration' of New Zealand's unimplemented treaty obligations to local government is a not a radical proposition at all, given its quasi-constitutional status and its intimate relationship with Central Government. However given the purpose and scope of Local Government in New Zealand, the broad principle based language of the LGA and the principles by which Local Government is to be provided, the 'presumption of consistent interpretation' with New Zealand's international treaty obligations is a better approach. Children and young people - who make up a significant portion of local populations - are underrepresented in Local Government empowering legislation. The application of the 'presumption' to international instruments like the UNCROC, would further the purpose of the LGA by recognising the rights of children, young people and their families an under-represented, but foundational component of the 'community'. This proposition is further buttressed by the recognition of Local Government at International Law[166] and with Local Government being included the the UNCROC implementation guide as one of the bodies required to implement its principles.[167]

IV JUDICIAL APPROACHES TO HUMAN RIGHTS

The applicability of unimplemented or under-implemented treaty obligations has long been an issue of much discussion. The orthodox view being that the two doctrines; the separation of powers and parliamentary sovereignty preclude the

[164] Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (3rd Ed, UNICEF Regional Office for Europe,Switzerland, 2007) 469.
[165] Ibid, 322.
[166]Draft articles on Responsibility of States for Internationally Wrongful Acts (*International Law Commission*, *Fifty-sixth session, Supplement No. 10* (A/56/10), chp.IV.E.1, November 2001) Article 4.
[167] Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (3rd Ed, UNICEF Regional Office for Europe,Switzerland, 2007).

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enforceability of treaties until they are incorporated into domestic law by the legislature.[168] This orthodox view was upheld in *Ashby* when the Court of Appeal ruled that judicial review of a decision could only proceed if a statute identified "a consideration as one to which regard must be had" either "expressly or by implication" "that the Courts can interfere for failure to take it into account."[169] Furthermore, the Court in *Ashby* held that even when the decision maker in their discretion failed to take New Zealand's international obligations, the dualist nature of New Zealand's constitution prevented the Court from judicially reviewing their decision.[170]

Haines proposes that since *Ashby* the judiciary have attempted to "ameliorate this rule, particularly in the case of unincorporated human rights treaties."[171] Haines in his paper describes the recognition and enforcement of New Zealand's international obligations, particularly in the case of unincorporated human rights treaties that has emerged largely from administrative immigration decisions cases like *Tavita*[172], as a 'new dawn'.[173] This *new dawn* is echoed by the judiciary themselves.

Lord Cooke in a commentary on jurisdiction of the courts to review administrative decisions quoted Lord Diplock's 'activism' in the *O'Reilly v Mackman*;[174] where he argued that the "final word on statutory interpretation or other question of law" rests with the courts instead of an administrative tribunal or administrative authority;[175]

> "*Where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is a matter for the courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So if the administrative tribunal or authority have asked themselves the wrong question and*

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[168] Philip A Joseph, *Constitutional Law* (Laws of New Zealand, Lexis Nexis Online, 2003) Paras 55-88 (accessed, 26 February 2010); Paul Craig "Fundamental Principles of Administrative Law" in David Feldman (ed.) *English Public Law* (Oxford University Press, Oxford, 2004) 13.14-18, 13.45-47; *Ashby v Minister of Immigration* [1981] 1 NZLR 222, 224 (Cooke J) (CA).
[169] *Ashby v Minister of Immigration* [1981] 1 NZLR 222, 225 (Cooke J) (CA).
[170] *Ashby v Minister of Immigration* [1981] 1 NZLR 222, 226 (Cooke J) (CA).
[171] Rodger Haines, "the Domestic Application of International Human Rights Standards in New Zealand: The Refugee Convention" (September 2004) Spring Seminar Series, Faculty of Law, University of Auckland http://www.refugee.org.nz/spring.html#N_3_ (accessed 26 February 2010).
[172] *Tavita v Minister of Immigration* [1994] 2 NZLR 257.
[173] Rodger Haines, "the Domestic Application of International Human Rights Standards in New Zealand: The Refugee Convention" (September 2004) Spring Seminar Series, Faculty of Law, University of Auckland http://www.refugee.org.nz/spring.html# (accessed 26 February 2010) Para 7.
[174] *O'Reilly v Mackman* [1981] AC 374, 382-383 in
[175] Sir Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986) 1, 7-9.

answered that, they have done something that the act does not empower them to do and their decision is a nullity."

Chief Justice Elias argues that the Courts have undergone a shift in the way they view the law relating to administrative decision making.[176] Elias argues that in addition to an emphasis on "substantive values in the legal system, through enactment of statements of rights and invocation of the rule of law" there is a developing culture of justification by administrative decision makers of their decisions to the Courts.[177] Elias maintains that this culture of justification has come from the tendency of legislators to adopt broad statements of fundamental rights and principles, which are invoked in judicial review.[178] This has lead to judicial review as a "quality control mechanism" and in many cases a "surrogate political process"[179] and often results in 'back-door' implementation of international obligations, as seen in *Sellers*[180] or in *Tavita*[181] where we see the courts holding administrative decision makers subject to NZ's International obligations.

In *Tavita*, Justice Cooke in the context of an administrative decision that was inconsistent with New Zealand's international obligations under the UNCROC made the often cited statement that those obligations are more than mere 'window-dressing' and then held when Counsel for the Minister of Immigration argued that the Minister and the Department are entitled to ignore the unincorporated international instruments;[182]

"*A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could also extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them."*

Cooke's use of the word "executive" includes, as we have established above, Local Government. Furthermore the LGA explicitly requires Local Government decisions and bylaws to be NZBORA compliant.[183] Justice Cooke has made it clear in *Tavita* that the Court will "give practical effect" to other international obligations as well.

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[176] Dame Sian Elias "Administrative Law for *Living People*" (2009) 68(1) Cambridge Law Journal, 47, 62.
[177] Ibid.
[178] Ibid.
[179] Ibid.
[180] *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, 49 (CA) Keith J.
[181] *Tavita v Minister of Immigration* [1994] 2 NZLR 257.
[182] *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 267 (CA) Cooke P.
[183] Local Government Act 2002, s 155(3).

Despite this promise, *Tavita* left confusion as to how to approach New Zealand's unincorporated or under-implemented international obligations. As Geiringer argued *Tavita* left an obligation for decision-makers to make decisions that are consistent with New Zealand's international obligations, but hasn't clarified how these international norms are to be invoked.[184] The problem rests with the relationship between the two models by which decision-makers should access international norms in the decision making process; these two models are;[185]

1) *Mandatory Relevant Consideration* ("The Consideration") – which includes unincorporated international norms as considerations that decision makers must have regard to; and the
2) *Presumption of Consistent Interpretation* ('The Presumption") – where the courts will presume that Parliament did not intend to legislate contrary to New Zealand's international obligations, and will interpret empowering legislation consistent with those obligations.

The two models, although they seem on the face similar as they both invoke due regard to international norms in the decision making process, result in very different outcomes. The 'Consideration' is primarily concerned with process, and could almost in application amount to mere box ticking.[186] The 'presumption' though is more "outcome-focused" and requires the decision-maker "to reach a result that is substantively consistent with the relevant international obligation."[187]

In *Puli'uvea* the Court says explicitly that *"the Court should strive to interpret legislation consistently with treaty obligations of New Zealand"*.[188] This puts the onus on decision-makers to make decisions that are consistent with New Zealand's treaty obligations, where the power-conferring statute allows for such a consistent interpretation.

The Supreme Court clarified this rule in the case of *Zaoui* by stipulating that rights will be "interpreted and the powers conferred […] are to be exercised, if the

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[184] Claudia Geiringer "*Tavita* and all That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66, 67.
[185] Claudia Geiringer "*Tavita* and all That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66, 67.
[186] Rodger Haines, "the Domestic Application of International Human Rights Standards in New Zealand: The Refugee Convention" (September 2004) Spring Seminar Series, Faculty of Law, University of Auckland http://www.refugee.org.nz/spring.html# (accessed 26 February 2010) para 7.
[187] Claudia Geiringer "*Tavita* and all That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66, 67.
[188] *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510, 516 (CA) Keith J.

wording will permit, so as to be in accordance with international law, both customary and treaty based."[189]

Haines points out that that the *presumption* is not only confined to Administrative Law cases that deal with immigration. The Court of Appeal has also applied the *presumption* in *New Zealand Air Line Pilots' Association Inc v Attorney-General*,[190] *Sellers v Maritime Safety Inspector*,[191] and *Governor of Pitcairn and Associated Islands v Sutton.* [192]

In *Sellers*, the Court of Appeal found;[193]

> "*New Zealand Courts for over a century made it plain that legislation regulating maritime matters should be read in the context of the international law of the sea and' if possible, consistently with that law…*"

In *Governor of Pitcairn*, the Court of Appeal held;[194]

> "*a general statute, however apparently comprehensive, is not to be interpreted as contrary to international law on such matters as sovereign immunity.*"

However, Haines argues that the presumption is best applied in *New Zealand Airline Pilots*;[195]

> *"We begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations, eg Rajan v Minister of Immigration [1996] 3 NZLR 543 at p 551. That presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant text. So* [it is incumbent on] *this Court* […] *to construe the Act in a manner that will as far as possible give effect to that purpose, Gross v Boda [1995] 1 NZLR 569 at pp 573 and 574. And it read the general language of the Employment Contracts Act 1991 conferring jurisdiction on the Employment Court as not overriding the customary international law of sovereign immunity. In the absence of such an approach almost any general statute would displace well-settled doctrines accepted by New Zealand in its international relations, Governor of Pitcairn and Associated Islands v Sutton [1995] 1 NZLR 426 at pp 430 and 438. In that type of case national legislation is naturally being considered in the broader international legal context in which it increasingly operates. A related instance appears in the references to good faith compliance with obligations in the Charter of the United Nations and the Vienna Convention on the Law of Treaties in New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641 at p 682; see also Commissioner of Inland Revenue v JFP Energy Inc [1990] 3 NZLR 536 at p 540.*

The Courts have been explicit about their willingness to enforce unincorporated treaty rights in the judicial review of administrative decisions. However the courts have

[189] *Zaoui v Attorney-General* (No 2) [2006] 1 NZLR 289, 321 (SC) Keith J for the Court.
[190] [1997] 3 NZLR 269, 280 (CA).
[191] [1999] 2 NZLR 44, 57 (CA).
[192] [1995] 1 NZLR 426, 430 (CA).
[193] *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, 57 (CA) Keith J for the Court.
[194] *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1NZLR 426, 430 (CA) Cooke P.
[195] *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269, 289 (CA).

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also shown that they are willing to enforce non-rights based treaty obligations as well. However one of the factors identified by the Court of Appeal held in the Air Line Pilots Association case was the "relative unimportance" of the international obligation at issue, compared to "a fundamental human rights treaty".[196] Given this willingness of the Court to apply the presumption even in cases that do not involve human rights, it is not unreasonable to infer that the same Court will apply the presumption and find in favour of children's rights in relation to an obligation of non-derogation from the principles of UNCROC by a local authority.

Geiringer suggests "that the presumption provides a flexible and nuanced starting point for assessing the impact of unincorporated international treaty obligations on statutory language, including statutory language that confers administrative power" like the LGA or the RMA.[197] Furthermore it ensures that New Zealand administrative decision makers align with Central Government international obligations because the courts will presume that Parliament intended to legislate consistently with its international treaty commitments and will hold administrative decision-makers to exercise their statutory authority accordingly.[198] This consistently is arguably more difficult to achieve with the application of the consideration which arguably allows the decision maker to dismiss the principles of any International instrument that New Zealand has ratified once it is considered.

Therefore it is UNICEF NZ's position that in a local government decision making context, decision makers are obligated to employ the *presumption*, and make decisions that read consistently with the UNCROC. The purpose provision of the Local Government Act which is broadly drafted and ambiguous not only allows for, but warrants such a reading.[199] This obligation is stronger when a decision has a direct effect on children and young people and evokes customary principles like the *paramountcy of the child* principle that are enshrined in the UNCROC.

V CONCLUSION

As is evidenced in this paper, UNCROC holds a significant and influential place in our country's legal framework and places specific reporting requirements on our Government as a ratifying State. UNICEF NZ believes that the unique legal status of

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[196] *Air Line Pilots Association v Attorney-General* [1997] 3 NZLR 269, 289 (CA) Keith J.
[197] Claudia Geiringer "*Tavita* and all That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66, 68.
[198] Melissa A Waters, "Using Human Rights Treaties to Resolve Ambiguity: The Advent of a Rights conscious Charming Betsy Canon" (2007) 38 VUWLR 237, 241.
[199] Local Government Act 2002, ss 3 & 14.

UNCROC necessitates its reach to include local authorities and place obligations on those local authorities to perform their functions in a child friendly manner.

From the analysis of the legislation that governs our local authorities, particularly the Local Government Act, it is evident that local authorities have a specific mandate to promote the wellbeing of their communities and to act in a sustainable manner while doing so. Communities naturally include children and, as such, UNICEF NZ believes that local authorities have a legislative obligation to take account of the rights of children.

Given that UNCROC is the beacon for children's rights it would be logical for local authorities to use the Convention as a guide in performing their functions in a child friendly manner. Doing so would lay a solid foundation for the ultimate establishment of child friendly cities throughout New Zealand.

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