



## **New Zealand's approach to Refugees: Legal obligations and current practices**

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The purpose of this report is to understand New Zealand's approach to its legal obligations concerning refugee. It first identifies these obligations and then examines current practice before offering recommendations for improvement.

### **Introduction**

Contemporary refugee law was established in the Post WWII period to aid displaced populations of Europe. It comprises primarily the 1951 Convention relating to the Status of Refugee, signed by NZ in 1960, and the 1967 Protocol relating to the status of Refugees signed by NZ in 1973.

These instruments center on a definition of "refugee" as a person who is outside their country of nationality or habitual residence and is unable or unwilling to avail themselves of the protection of that country, due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. There was no question as to who were the persecutors and the obligation to help the victims.

The problem of refugees today is profoundly different. Even as armed conflict and human rights abuses continue to force individuals and groups to flee their home countries, some governments are withdrawing from the legal duty to provide them with the protection they require. While developed countries proclaimed a willingness to assist refugees, they appear committed to a pattern of protectionist strategies designed to avoid international legal responsibility toward involuntary migrants. For the refugees themselves, such defensive strategies provide inferior or illusory protection. Thus, refugee law is much of the time misunderstood by governments when it should be regarded as a mechanism by which government agree to compromise their sovereign right to independent action in order to contain conflict and avoid international crisis. In fact, governments are struggling to find the right balance between protecting their borders and protecting refugees.

Since the 19<sup>th</sup> Century, when refugees arrived in New Zealand to escape political oppression in Europe, this country has accepted refugees from many different parts of the World. Between 1974 and 1991 NZ accepted Chileans who fled their country after the army's overthrow of the Allende government in 1973,



and a small number of refugees from the Soviet Union and other European countries under Soviet domination. Between 1977 and 1993, 5200 Cambodians, 4500 Vietnamese and 1200 Laotians were accepted for settlement in NZ; and between 1992 and 1995 Bosnians refugees arrived in NZ and around 600 displaced people from Kosovo were accepted as refugees.

Small groups of refugees continued to enter NZ in the late 90's and early 2000's. By 2006, some 1800 Somalis had arrived as refugees, and other had emigrated under the family reunification scheme. From 2000-2003, around 1800 Zimbabweans fleeing government persecution were granted permanent residence.

In 2011, the total number of refugees in the world was estimated at 10.5 million people<sup>1</sup>. This includes 1,934 in New Zealand. Since 2000 the number of people seeking asylum in NZ has decreased significantly. In 2010 – 2011, 337 people sought asylum in NZ compared with 1703 in 2000. Fiji is currently the largest country of asylum seekers (15%), followed by Iran (13%) and China (7%)<sup>2</sup>. Lastly, New Zealand's annual refugee quota is above average on a per capita basis compared with a number of other resettlement states (8 out of 19 resettlement countries). Other countries with significant resettlement quota include the US, Canada or Australia (the highest). The NZ resettles an average of 750 quota refugees per annum referred by the UNCHR.

#### **A. New Zealand's International obligations**

##### **1. The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the status of refugee (the Refugee Convention)**

The 1951 Convention Relating to the Status of Refugees (RC) requires NZ not to expel or return a refugee to any other country or border where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. But NZ must not provide any protection if the person:

- has committed a crime against peace, a war crime or a crime against humanity;
- has committed a serious non-political crime outside NZ prior to entry in NZ;
- has been guilty of acts contrary to the purpose and principles of UN.

NZ may expel a refugee where there are reasonable grounds for regarding the refugee as a danger to the security of NZ or following conviction for a serious crime the refugee constitutes a danger to the community. Finally, the Refugee Convention requires NZ to meet a range of minimum standard for the

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<sup>1</sup> UNHCR, UNHCR Statistical Yearbook 2011: Statistical Annex.

<sup>2</sup> International Migration Outlook – New Zealand 2010 / 2011. OECD Continuous Reporting System on Migration.



treatment of refugees, such as non-discrimination, access to employment, housing, education and the courts.

## **2. The 1984 Convention Against Torture**

Under article 3 of the Convention Against torture, NZ must not expel a person to another country where there are substantial grounds for believing that the person would be in danger of being subjected to torture. Torture is defined under the Convention as any act by which severe pain or suffering is intentionally inflicted on a person for such purposes as obtaining information, confession or punishment. Torture is limited to actions perpetrated by governments but the risk of torture does not have to be related to race, religion, nationality or membership of a social group as in the Refugee Convention.

Based on the view that torture is an inappropriate punishment in any circumstances, article 3 does not exclude persons from protection in the same way as the Refugee Convention, where they have:

- -committed a crime against peace, a war crime, or a crime against humanity;
- -committed a serious non-political crime outside New Zealand prior to entry to New Zealand; or
- -been guilty of acts contrary to the purposes and principles of the United Nations.

Similarly, unlike the Refugee Convention, article 3 does not allow New Zealand to expel a person where there are reasonable grounds for regarding the person as a danger to the security of New Zealand or, following conviction for a particularly serious crime, the refugee constitutes a danger to the community.

## **3. The International Covenant on Civil and Political rights (ICCPR)**

Under article 6 of the ICCPR, every human being has the inherent right to life - this right shall be protected by law and no one shall be arbitrarily deprived of life. Under article 7 of the ICCPR, no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. Articles 6 and 7 create absolute obligations not to send a person back to another country in certain circumstances. They are not to be weighed up against other factors, and there may be no exceptions to the prohibition on expulsion.

## **4. The United Nations Convention on the rights of child (UNCROC)**

The article 3 of the UNCROC exposes that in all actions concerning children, whether undertaken by private or public institutions, the best interests of the child shall be a primary consideration. Moreover article 9 of the UNCROC states that States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.



## **B. Incorporation issues**

### **1. Difference between monist and dualist system.**

Monist states accept that the internal and international legal systems form a unity. Both national legal rules and international rules that a state has accepted, for example by way of a treaty, determine whether actions are legal or illegal. In a pure monist state, international does not need to be translated into national law.

For example: suppose a country has signed the RC, but some of its national laws accept the expelling of refugees back to their country even if they will be persecuted, then the refugee can invoke the RC in a national courtroom and ask the judge to apply the RC and to decide that the national law is invalid.

Dualists emphasize the difference between national and international law, and require the translation of the latter into the former. Without this translation, international law does not exist as law. International law has to be national law as well, or it is no law at all. In NZ, the dualist view is predominant.

### **2. The Refugee Convention**

The Refugee Convention was incorporated into the 1999 Immigration Amendment Act. Therefore, it is currently incorporated into the 2009 Immigration Amendment Act. Consequently, a person who is claiming for the refugee status, as well as someone who has been recognized as a refugee in NZ, may not be removed or deported from NZ unless it is permitted for national security concerns. But when we are looking at the Refugee Convention, it provides only a little guidance on the processes and standards in making determinations about refugee status.

### **3. The Convention against Torture**

The Convention Against Torture was not incorporated into immigration legislation before 2009. It was confusing to decision-makers that obligations which are absolute and directly linked to immigration decision-making were not specifically incorporated into immigration legislation. Such obligations arguably warrant a clear legal framework and determination process that contributes to understandable and accessible legislation. But since 2009, the NZ legislation has incorporate those international instruments. Moreover, there are potentially complex issues to be worked through regarding the definition of articles 6 and 7 of the ICCPR, such as what constitutes cruel treatment and arbitrary deprivation of life.

**Recommendation.** It would be helpful for New Zealand to work these issues through in the context of drafting legislation prior to any major challenges. A clear definition of what constitute a cruel treatment and an arbitrary deprivation of life will preserve legal and jurisprudential acquis in this domain. The main idea will be to provide New Zealand with a framework for a comprehensive approach to the torture and



ill-treatment definition and its impact on the enjoyment of human rights, in particular when monitoring the respect and implementation of the article 6 & 7 of the ICCPR.

Instructions to immigration officers currently require these obligations to be taken into account in removal processes. Claims may also be dealt with by the Removal Review Authority, the Deportation Review Tribunal and the Minister of Immigration, as individual cases arise. Fewer than 20 people are known to have claimed protection under article 3 in New Zealand, and only one claim has been successful on torture grounds. No claims are known to have been made explicitly under articles 6 or 7 of the ICCPR. The risk of cruel, inhuman and degrading treatment or arbitrary deprivation of life may have been raised in humanitarian appeals to an independent authority, the Department of Labour or the Minister of Immigration.

#### **4. The International Covenant on Civil and Political Rights**

The ICCPR has not been completely incorporated into New Zealand domestic law through the Bill of Rights Act 1990. But the New Zealand Bill of Rights Act 1990 in sections 8 and 9 sets out that:

- no one shall be deprived of life, except on such grounds as are established by law and are consistent with the principles of fundamental justice, and
- everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

While there is no express prohibition in the ICCPR against expulsion of person at risk of such treatment, it is considered widespread as an inherent obligation. In June 2005, New Zealand's Supreme Court (*Attorney-General v Zaoui (No.2)* [2005] NZSC 38) found that sections 8 and 9 of the Bill of Rights Act and articles 6 and 7 of the ICCPR did not allow New Zealand to deport if:

*'...there are substantial grounds for believing that, as a result of the deportation, the person would be in danger of being arbitrarily deprived of life or of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.'*

In NZ, there is no reference to articles 6 & 7 of the ICCPR in current immigration legislation. However, the ICCPR will be considered before expelling a person from NZ.

#### **C. Expulsion of refugees and international obligations**

Can NZ expel a person who is already recognized as a refugee or who is resides in New Zealand and asking for protection? The Refugee Convention allows NZ to expel persons when their conduct is



outweighing their need for protection. On grounds of national security or public order, NZ can expel a refugee and s/he may only be returned to a place where their life or freedom may be threatened if:

- there are reasonable grounds for regarding the person as a danger to the security of the country in which she or he is, or
- having been convicted by a final judgment of a particularly serious crime (32.1), constitutes a danger to the community of that country (article 33.2).

International obligations rose under the Convention against Torture and the ICCPR applied as well but were not set out in the NZ legislation since 2009. Therefore, the NZ legislation was not clear on the process of assessing international obligations in an expulsion situation to ensure that international obligations are upheld and that the right refugee is expelled.

**Recommendation.** The requirements to assess article 32.1 and 33.2 prior to removal or deportation of refugees is set out in the part of the Immigration Act dealing with refugees determinations but is still silent on process or tests to be met. Even now, NZ legislation makes the task difficult for those responsible for expulsions such as the Deportation Review Tribunal, as expelling refugees back to their country where they may face persecution would be a serious violation of international refugee law.

#### **D. Distinction between Refugee Convention and Refugees as part as the Refugee quotas Programme**

All claims for refugee status made in NZ must be determined in accordance with the Immigration Act.

##### **1. The Refugee quotas Programme**

In 1987 the NZ government established a formal annual quota for the resettlement of refugees. This means that a person can be recognized as a refugee in NZ without the need for submission and determination of a claim under the Immigration Act as to whether the person has been recognized as a refugee outside NZ and brought to NZ under a government mandated programme. In recent years, the focus has been on refugees most in need of resettlement as identified by the UNHCR. Before resettlement decisions are made, refugees are interviewed by Refugee Quota Branch officer from the Department of Labour in the country of asylum or by officials of international organizations.

The NZ government tries to ensure the resettlement quota remains targeted to refugees and the NZ has the capacity to provide good settlement outcomes to those accepted under the Refugee Quotas Programme. Three main categories are targeted by NZ authorities:

- “Women-at-risk”,
- medical/ disable category
- the UNHCR Priority Protection subcategory which depends on the circumstances.



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For instance, UNHCR considers “women-at-risk” as “girls or women who have protection problems particular to their gender, whether they are single head-families, unaccompanied girls, or together with their male family members”<sup>3</sup>. All those categories include the immediate family, spouse & dependent children of the principal claimant. A total of 750 people enter NZ under the refugee quotas program each year. It can take up to 18 months for refugees to arrive in NZ after approval. Moreover, since 2010, refugees can sponsor members of their families under the Refugee Family Support Category. This has been limited to one priority sponsor.

The size and composition of the refugee settlement quota has been traditionally been set annually. However, from 2011-2012 the Minister of Immigration and Minister of Foreign Affairs agreed to a three-year planning cycle. The quota is reviewed annually after consulting relevant government departments, UNHCR & nongovernmental organizations. NZ’s annual refugee quota is above average on a per capita basis compared with a number of other resettlement states such as the US, Australia or the UK. Refugees who have accepted for resettlement in NZ under the refugee quota program are granted a permanent residence visa on arrival. As NZ permanent residents, they are entitled to live in NZ permanently but do not hold a NZ passport.

These refugees spend their first six weeks at an orientation programme at the Mangere Refugee Resettlement Center in Auckland. Each year, the center handles six intakes of about 120 people. The centers include accommodation blocks, an early childhood learning centre, classrooms, medical and dental clinics, a mental health clinic and general living and recreation areas. The orientation programme is conducted in the refugees’ language and provides general information about life in New Zealand, including the institutions and services integral to their successful settlement into New Zealand society. The programme also aims to build the basic social and coping skills required for a new life in New Zealand.

## 2. Asylum Seekers Refugees / Convention

Asylum seekers who come to NZ (legally or illegally) to look for international protection will become refugees when their refugee status is determined by the authorities. Under article 14 of the 1948 Universal Declaration of human rights, everyone has the right to seek asylum and the Refugee Convention prohibits states from imposing penalties on those entering “illegally” who come directly from a territory where their life or freedom is threatened. NZ, therefore, cannot ban entry to a person who has a well-founded fear of persecution and they should be viewed as a refugee and not labeled as “illegal migrant”. However, asylum seekers may be placed in detention upon arrival in NZ if concerns exist about their identity or their risk to national security or public order. Such process must be balanced

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<sup>3</sup> UNHCR, report 2004 on resettlement programmes.



against the person's right to freedom of movement and the fact its most of the time difficult to provide documents.

For the asylum seekers who are not detained, a visa is granted to allow them to remain in NZ while their claim is assessed. Most of the time, especially for families, a work visa will be issued to allow the claimant to find paid work or access welfare provisions. If asylum seekers are granted refugee status, they are provided with a work visa if they don't already have one. They may, then, lodge a residence application, which will give them the same access to the labour market as other permanent residents. Permanent residence is approved separately from refugee status.

If a claim has been assessed and declined, a failed refugee status claimant may not apply for a further visa while they are in NZ and must leave the country as soon as possible. However, whereas it seems there is no legislative limitation on the number of times an individual can claim refugee status in NZ, subsequent claims need to be based on new information or changed circumstances. Appeal avenues exist for failed refugees' status claimants through the Refugee Status Appeals Authority and the Courts. Again, the asylum seeker who makes a subsequent claim may apply for further visas to allow them to stay in NZ lawfully while their claim is assessed.

### 3. The Detention issue

Under the 2009 Immigration Act, asylum seekers can be held in detention until they are granted a visa or removed from NZ. In April 2012, in response to the possibility that a mass arrival of refugees would overwhelm the refugee protection process, a new Immigration Amendment Bill proposed solutions include mandatory detention of mass arrivals under a group warrant for a period up to six months and would limit their rights to judicial review for those detained. Therefore, automatic detention of asylum seekers as part of a policy to deter future asylum seekers is contrary to the principles of international protection. The bill has been prompted as a solution to respond to people arriving unlawfully by boat to NZ. However, under article 31 of the Refugee Convention penalizing asylum seekers for irregular entry runs counter to NZ' international obligations.

**Recommendation.** Instead of detention, in a camp or prison, New Zealand should upon the strengths and goodwill of its communities to temporarily house potential refugees. Hong Kong and Belgium have done this and report reduced costs and better, fairer outcomes.

### 4. The Environmental refugee' issue

The rapidly growing literature on migration caused by environmental changes requires New Zealand to think of a theoretical frame in which to integrate specific case studies. Approximately 25 million people





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worldwide are displaced because of war, persecution or natural disasters; the NZ government needs to rethink its policy on environmental refugees.

Recommendations include the preparation of legislation to address the issue of environmental refugees under the Immigration Act. Moreover, the definition of refugee must not be limited to the that established in the Refugee Convention (“a person persecuted”) but must include environmental refugees are people who can be protection under the Convention. This would take time as a consensus between countries which have signed the Convention must be found. In such way, New Zealand must support the redrafting of the Refugee Convention. Finally, New Zealand must consider recalculating the current immigration quota scheme to provide greater time for integrating refugees or migrants in NZ.