

CHAPTER TWO

LITERATURE REVIEW

A. Asylum Seekers and Refugee

According to the United Nations High Commissioner for Refugees:

“An asylum seeker is an individual who is seeking international protection. In countries with individualized procedures, an asylum seeker is someone whose claim has not yet been finally decided on by the country in which he or she submitted it. Not every asylum seeker will ultimately be recognised as a refugee, but every refugee is initially an asylum seeker.”¹

Asylum is the granting of protection by a country to people fleeing from persecution or serious danger in their own country. Asylum includes a variety of elements such as the principle of non-refoulement and ensuring human standards of treatment.²

In another definition, “asylum seeker” means a person who has applied for asylum under the 1951 Refugee Convention on the Status of Refugees on the ground that if he returns to his country of origin he has a well-founded fear of persecution on account of race, religion, nationality, political belief or membership of a particular social group. He remains an asylum seeker for so long as his application or an appeal against refusal of his

¹United Nations High Commissioner for Refugees (UNHCR), 2006, “UNHCR Master Glossary of Terms”, Rev.1, UNHCR, p. 4.

²United Nations High Commissioner for Refugees, “UNHCR and International Protection: A Protection Induction Programme Handbook, Glossary of Terms and Credits”, taken from <http://www.unhcr.org/44b5021d2.pdf>, downloaded on November 5th, 2016 at 12.06am.

application is pending.³

The 1951 Convention Relating to the Status of Refugees (and its 1967 Protocol), to which Australia is a signatory, defines a refugee as: any person who is owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable, or owing to such fear, is unwilling to avail himself/herself of the protection of that country.⁴

There is a difference between a 'refugee' and an 'asylum seeker' because the former has had their asylum claims assessed and been found to satisfy the above definition. This assessment can be done by a country that has agreed to the 1951 Refugee Convention or by the United Nations High Commissioner for Refugees (UNHCR). There is no such thing as a 'genuine refugee'.

A refugee by technical definition is simply someone who has been recognised as satisfying the above Convention definition. Furthermore, a person is a refugee within the meaning of the 1951 Convention as soon as they satisfy the above definition. This might actually occur before their refugee status is formally determined by a country or the UNHCR. Refugee status is therefore declaratory in nature in that, a refugee does not become a

³Harry Mitchell QC, 2006, "The Distinction between Asylum Seekers and Refugees", available at: <http://www.migrationwatchuk.org/briefingPaper/document/70>, accessed on May 29th, 2016 at 2.21pm

⁴Refugee Council, "Background Information on Refugees and Asylum Seekers", taken from https://www.refugeecouncil.org.au/docs/news&events/RW_Background_Information.pdf, downloaded on May 29th, 2016 at 1.23pm.

refugee because they have been recognised to be one but rather, they are recognised because they are a refugee.⁵

According to the 1951 United Nations Convention Relating to the Status of Refugees in the UK, a person is officially a refugee when they have their claim for asylum accepted by the government.⁶ While another definition of refugees are people fleeing conflict or persecution. They are defined and protected in international law and must not be expelled or returned to situations where their life and freedom are at risk. At UNHCR, we have been assisting them for over half a century.⁷

When discussing about asylum seekers, refugees and migrants have very different experiences and reasons for moving to another country. Migrants choose to leave their home country and can choose where to go and when they might return to their home country. Meanwhile, Asylum seekers and refugees, flee their country for their own safety and cannot return unless the situation that forced them to leave improves.⁸

In addition, before someone or a group of people is given refugees status, they are asylum seekers. Asylum seeker is a general term for a person

⁵United Nations High Commissioner for Refugees (UNHCR), “Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees”.

⁶Refugee Council, 2016, “The Truth about Asylum”, available at: <http://www.refugeecouncil.org.uk/policy-research/the-truth-about-asylum/the-facts-about-asylum>, accessed on May 29th, 2016 at 1.48pm.

⁷UNHCR, “Refugee”, available at: <http://www.unhcr.org/refugees.html>, accessed on May 29th, 2016 at 2.09pm.

⁸Australian Human Rights Commission, 2015, “Asylum Seekers and Refugee Guide”, available at: <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/asylum-seekers-and-refugees-guide>, accessed on May 29th, 2016 at 2.25pm.

who has not yet received a decision on his/her claim for refugee status.⁹ While a refugee is someone who has been recognised under the 1951 Convention relating to the status of refugees to be a refugee.

B. International Refugee Law

The Refugee Law is a remedial or palliative branch of human rights law. The purpose of its Law is to ensure that those whose basic rights are not protected (for a Convention reason) in their own country. If they are able to reach an asylum state, they are entitled to invoke rights of substitute protection in any state that is a party to the Refugee Convention. Therefore, the right of entry which is undoubtedly the most visible consequence of refugee law, which is in fact fundamentally consequential in nature, and of a duration limited by the persistence of risk in the refugee's state of origin.¹⁰

It is no more than a necessary means to a human rights end that is being the preservation of human dignity of an involuntary migrant when his or her country of origin cannot or will not meet that responsibility. In pith and substance, refugee law is not immigration law at all, but it is rather a system for the surrogate or substitute protection of human rights.¹¹

When governments are unwilling or unable to protect their citizens, individuals may suffer such serious violations of their rights that they are forced to leave their homes, and even their families, to search for a safe place

⁹Yordan Gunawan and Gatot Priambodo, 2013, "Burma's Rohingya Case in International Law Perspective", *Jurnal Media Hukum*, Vol. 20, No. 1, 2013, Yogyakarta, Fakultas Hukum Universitas Muhammadiyah Yogyakarta, p. 166.

¹⁰James C. Hathaway, 2015, *The Rights of Refugee under International Law*, New York, Cambridge University Press, p. 5.

¹¹*Ibid.*

in another country. From that case, it becomes the responsibility of States to protect their citizens. Since, by definition, the governments of their host countries have the responsibility to protect the basic rights of refugees, while the international community needs to respect all the basic rights of refugees.

In the aftermath of the World War II, the United Nations General Assembly created the Office of the United Nations High Commissioner for Refugees (UNHCR). UNHCR is mandated to protect and find durable solutions for refugees. Its activities are based on a framework of International Law and standards that include in the 1948 Universal Declaration of Human Rights and the four Geneva Conventions (1949) on international humanitarian law, as well as an array of international and regional treaties and declarations, both binding and nonbinding, that specifically address the needs of refugees.¹²

1. Refugee Convention (1951 Convention)

The 1951 Refugee Convention was signed by 144 State Parties, including Australia. It defines the term “refugee” and also the rights of displace as well as the legal obligations of the States to protect them. One of the protection is known as non-refoulement principle which is contained in the Article 33 of 1951 Refuge Convention.

An International instrument, although it is not a juridical instrument, which outlines and insists principles for asylum institution, is

¹²Kate Jastram and Marilyn Achiron, 2001, “A Guide to International Refugee Law”, taken from http://www.ipu.org/pdf/publications/refugee_en.pdf, downloaded on November 6th, 2016 at 10.50pm.

the Declaration on Territorial Asylum, adopted by the UN General Assembly in 1967.¹³

2. The 1967 Protocol relating to the Status of Refugees

The aim of the 1967 Protocol was to acknowledge the applicability of the 1951 Convention to contemporary refugee movements. The Protocol is an independent instrument to which States may accede without becoming Parties to the 1951 Convention, though this rarely happens. States Parties to the Protocol agree to apply the provisions of the Convention to refugees who meet the Convention's definition but without the Convention's time or geographical limitations.¹⁴

When becoming parties to the Convention and/or the Protocol, states may expressly mention that they will not apply, or will only apply with modifications, certain articles of the Convention. These reservations cannot, however, be made in relation to key provisions, including Article 1 (the refugee definition), Article 3 (non-discrimination based on race, religion or country of origin) and Article 33 (non-refoulement), provisions which all Parties to the Convention and/or Protocol must accept.¹⁵

C. UNHCR's Role as the Refugee Convention Protector

The United Nations High Commissioner for Refugees (UNHCR) is the inter-governmental organization tasked with refugee protection. In Article

¹³Lucy Gerungan, 2010, "Lembaga Suaka dalam Hukum Internasional", *Jurnal Hukum UNSRAT*, Vol. XVIII, No. 1, 2010, Manado, Universitas Sam Ratulangi, p. 6.

¹⁴UNHCR, 2005, "An Introduction to International Protection", Office of the United Nations High Commissioner for Refugee, p. 27.

¹⁵*Ibid.*

35 of the 1951 Convention, States have undertaken to cooperate with the UNHCR in the exercise of its functions. The 1951 Convention is an instrument of its time and the definition, for example, it reflects the anti-discrimination concerns that were prevalent in the years that followed 1945. There are several points to bear in mind. First, there is no international monitoring mechanism for refugee law. Unlike other areas of human rights law, an individual who is dissatisfied with the result of the national status determination system is unable to challenge this directly at the international level. The concept of responsibility in refugee law is an atomized one which falls onto individual states. Second, there are exceptions to even the most fundamental legal protections. Article 33 (2) makes refoulement permissible in defined circumstances, even though this norm is described as the cornerstone of the legal regime. Refugee law thus has inherent problems and often stands in sharp contrast to modern trends in human rights law.¹⁶

1. Non- Refoulement Principle

The most urgent need of refugees is to secure entry into a territory in which they are sheltered from the risk of being persecuted. This fundamental concern must somehow be reconciled to the fact that all of the earth's territory is controlled or claimed by governments which, to a greater or lesser extent, restrict access by non-citizens. This clash of priorities has led to proposals to lease land from states on which to shelter refugees and even to attempts to establish internationally supervised

¹⁶Colin J. Harvey, 2000, "Dissident Voices: Refugees, Human Rights and Asylum In Europe", Vol. 9, No. 3, ISSN 367396013777, London, Thousand Oaks, CA and New Delhi, p. 36.

sanctuaries for would-be refugees within the territory of their own states. To date, however, limited international authority and resources have prevented these options from replacing entry into a foreign state as the most logical means to access safety. The stakes are high: refugees that are denied by admission to a foreign country, are likely either to be returned to the risk of persecution in their host state, or to be thrown into perpetual “orbit” in search of a state willing to authorize entry¹⁷

Non-refoulement is a concept which prohibits states from returning a refugee or asylum seeker to territory where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.¹⁸ Procedures or arrangements for identifying refugees should provide a guarantee against refoulement, by ensuring that people who are entitled to protection receive it. Such procedures or arrangements are particularly important when a country receives both asylum-seekers and migratory movements. In UNHCR's view, respect for the principle of non-refoulement can therefore be most effectively ensured if claims to refugee status and asylum are determined substantively and expeditiously.¹⁹

The rule of non-refoulement has been applied and followed by States even before the adoption of the 1951 Convention Relating to the

¹⁷James C. Hathaway, *op. cit.*, p. 279.

¹⁸Sir Elihu Lauterpacht and Baniel Bethlehem, “The Scope and Content of the Principle of Non-Refoulement: Opinion”, available at: <http://www.unhcr.org/publications/legal/419c75ce4/refugee-protection-international-law-scope-content-principle-non-refoulement.html>, accessed on May 29th, 2016 at 10.59pm.

¹⁹UNHCR, “UNHCR Note on the Principle of Non-Refoulement”, available at: <http://www.refworld.org/docid/438c6d972.html>, accessed on November 2nd, 2016 at 2.12am.

Status of Refugee. The principle of non-refoulement contained in Article 33 of the Refugee Convention is one of the codified provision of non-refoulement and also considered as the best form of expression apart from provisions of other human treaties with similar effect.²⁰

2. Asylum Procedures Directive (APD)

The Asylum Procedures Directive (recast) was adopted by the European Parliament and the Council in 2013 and was to be transposed into Member States' national legislations by July 2015. It repealed Council Directive 2005/85/CE on minimum standards on procedures in Member States for granting and withdrawing refugee status.²¹

According to Article 33 (1) and (2) (c) of the APD, Members States may consider an application for international protection as inadmissible if a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38 APD.²² The new Asylum Procedures Directive is much more precise than the previous one. It creates a coherent system, which ensures that asylum decisions are made more efficiently and more fairly and that all Member States examine applications with a common high quality standard.

²⁰Dina Imam Supaat, 2013, "Escaping The Principle of Non-Refoulement", *International Journal of Business, Economics and Law*, Vol. 2, Issue 3, 2013, ISSN 2289-1552, p. 86.

²¹European Commission, "Asylum Procedures" , available at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/common-procedures_en, accessed on April 16th, 2017 at 5.43pm.

²²UNHCR, 2013, "Legal Considerations on the Return of Asylum-Seekers and Refugees From Greece to Turkey as Part of the EU-Turkey Cooperation in Tackling the Migration Crisis Under the Safe Third Country and First Country of Asylum Concept", UNHCR, p. 2.

One of the new Procedural rules are specified in a way to provide better guarantees to applicants (stricter terms, rules on interviews, more elaborate set of rules on appeal procedures) and speed up the procedure and prevent time loss (accelerated and prioritized procedures, preliminary examination).

The chances for asylum seekers gaining protection depend greatly upon the procedures used to assess their cases. Even the most compelling claim for international protection may fail if it is not fully and fairly considered. The Directive aims to harmonize procedural guarantees given during the asylum procedure and to uphold the quality of asylum decision-making in the Member States. The Directive confirms certain basic procedural guarantees such as the right to a personal interview, the right to receive information and to communicate with UNHCR, the right to a lawyer and the right to appeal. However, some provisions in the directive have the potential to lead to breaches of international refugee law, including to the refoulement of-in need of international protection.²³

D. Requirements for the Third Countries to Receive Transferred – Asylum Seekers from the Party of Refugee Convention.

In recent years, destination states have made increasing use of ‘safe third country’ restrictions. The government prepares a list of countries that are thought to be ‘safe’ in some generic sense. Typically, asylum adjudicators

²³European Council on Refugees and Exiles, “Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status”, taken from <http://www.unhcr.org/4a9d12ef9.pdf>, downloaded on May 29th, 2016 at 10.47pm.

are then instructed to refuse to decide an asylum claim in substance if the person earlier passes through, and should have sought asylum in a third country that is on that 'safe' list. The concept might be announced unilaterally by the destination country, or it might be part of a readmission agreement or an agreement to allocate responsibility for deciding asylum claims.²⁴

Resettlement is a partnership activity, without the generosity, commitment and expertise of States, NGOs and others, it could not take place.²⁵ Resettlement involves the selection and transfer of refugees from a state in which they have sought protection to a third state which has agreed to admit them – as refugees – with permanent residence status. The status provided ensures protection against refoulement and provides a resettled refugee and his/her family or dependants with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country.²⁶

1. Who are Qualified for Resettlement?

Resettlement under the auspices of UNHCR is only available to mandate refugees who have a continued need for international protection.

The search for durable solutions is a central part of UNHCR's mandate.

Consideration of all three durable solutions (voluntary repatriation, local

²⁴UNHCR, 2001, "Global Consultation on International Protection, Regional Conference, Conclusion", Budapest (6-7 June); Rosemary Byrne and Andrew Shacknove, "The Safe Country Notion in European Asylum Law", 9 *Harvard Human Rights Journal* 185; Stephen H. Legomsky, 2003, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection", *International Journal of Refugee Law*, V. 15, No. 4, 2003, p. 575.

²⁵UNHCR, 2011, *UNHCR Resettlement Handbook*, Geneva, Switzerland, p. 1.

²⁶*Ibid*, p. 3.

integration and resettlement) may identify resettlement as the optimal solution for an individual refugee or a refugee group.²⁷

Based on an interview conducted for this research, Prof. Madhu Naiker, said that the transfer (resettlement) of refugee could happen if the third country meets all the protection guidelines and does not necessarily need to have ratified the Refugee Convention. These are countries like Malaysia and Cambodia which Australia is trying hard. Australia is now informing the government to send the Nauru people to another place and close the camp as soon as possible which will probably take around 2 years. The third country resettlement matters can change at an instance and be challenged as well. Officially, resettlement countries recognized by the UNHCR are very few and that is the whole problem with this third country resettlement debate.²⁸

2. Refugees under UNHCR's mandate

Two categories of people may be refugees within UNHCR's international protection mandate:

- a. Refugees within Article 1A (2) of the 1951 Convention; and
- b. Refugees under the broader refugee definition.

Based on Article 1A (2) of 1951 Refugee Convention:

“a person who... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of nationality and is unable or, owing to such fear, is unwilling to

²⁷UNHCR, 2013, “Frequently Asked Questions about Resettlement”, p. 2, available at: <http://www.unhcr.org/en-au/56fa35b16>, accessed on December 18th, 2016 at 7.14pm.

²⁸Interview with Madhu Naiker, an International Expert on Refugee in Australia, on November 11th – December 12th, 2016 at 9.50am.

avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or unwilling to return to it.”²⁹

Certain states are considered “traditional” resettlement states because of their long-standing programmes, namely: Australia, Canada, New Zealand, the Netherlands, the Nordic countries (Denmark, Finland, Norway and Sweden) and the United States of America. Other countries have established programmes over the last decade, including Argentina, Brazil, Chile, Iceland, Ireland and the United Kingdom. Since 2007, 14 new countries have indicated their readiness to receive a limited number of resettlement submissions from UNHCR, twelve of which have formally announced the establishment of resettlement programmes: Belgium, Bulgaria, the Czech Republic, France, Germany, Hungary, Japan (pilot), Portugal, Romania, Spain, Switzerland and Uruguay.³⁰

3. Strict Requirements to be Considered as a Safe Third Country

The UN High Commissioner for Refugees stressed that it is not enough that refugees are safe from being returned to persecution in their home country (the non-refoulement principle). Other requirements in the Refugee Convention must be met, including access to social assistance, healthcare, work and education. The High Commissioner also stressed that a country must abide by the rules of the Convention in practice, not only on a paper. Furthermore, an asylum seeker should have a close connection

²⁹Article 1A (2) of 1951 Refugee Convention Relating to the Status of Refugee.

³⁰UNHCR, 2013, *Frequently Asked Questions about Resettlement*, p. 6.

to a country that is considered a safe third country. Travelling through a country to reach another is not sufficient.³¹

International cooperation and burden-sharing is a prerequisite for refugee protection, stresses UNHCR, and the country that has received an asylum application has primary responsibility to provide that person with protection. A country should only transfer responsibility for processing an asylum application to another safe country if both countries have asylum systems of the same standard and there should be a clear agreement between both countries about who is responsible for what.³²

E. International Human Rights Law and the Principle of Non-Refoulement

The understanding of international human rights instruments that do not enshrine a right to asylum or a specific non-refoulement clause can offer protection to people that in the need of it, but people who are outside the framework of the Refugee Convention and its Protocol started as a jurisprudential construction within the European regional framework, and later in the context of another international human rights instrument.³³

1. The principle of Non-Refoulement in International Human Rights Law

From the early 1960s, the now disappeared European Commission of Human Rights (ECommHR), established under the (European)

³¹Eirik Christophersen, 2016, "What is a Safe Third Country?", *Report from Norwegian Refugee Council*, available at: <http://reliefweb.int/report/world/what-safe-third-country>, accessed on November 12th, 2016 at 10.57pm.

³²*Ibid.*

³³M.-T. Gil-Bazo, 2015, *Refugee Protection under International Human Right Law: From Non-Refoulement to Residence and Citizenship*, *Refuge Survey Quarterly*, Oxford, pp. 5-6.

Convention for the Protection of Human Rights (ECHR) to monitor compliance by States Parties with the ECHR, found that despite its silence on asylum and non-refoulement matters, the Convention could be applicable to instances of forced removal.³⁴

The absolute nature of the prohibition to remove someone to a risk of torture has also been affirmed by the International Human Rights Monitoring Bodies (IHRMBs) in the universal system. As in the case of the ECHR, the International Covenant on Civil and Political Rights (ICCPR) does not include a specific non-refoulement provision. Although the HRC's attitude was hesitant at first towards finding an implicit prohibition of non-refoulement in the ICCPR (and notably on Articles 6 and 7, on the right to life and the prohibition of torture, respectively), it evolved over time to accept such prohibition, most likely influenced by the case-law of the ECtHR. The Human Rights Convention (HRC) was confronted with the question for the first time in an extradition case lodged in 1987.³⁵

2. Universal Declaration of Human Rights

Universal Declaration of Human Rights was enacted by the General Assembly of United Nation on December 10, 1948. Article 14 of Universal Declaration of Human Rights states that:³⁶

³⁴*Ibid*, p. 6.

³⁵*Ibid*, p.10.

³⁶Universal Declaration of Human Rights (UDHR), taken from http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf, downloaded on May 30th, 2016 at 6.35am.

- a. Everyone has the right to seek and enjoy in other countries asylum from persecution.
- b. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

It is important base on International Law to grant asylum seekers permission to entry as well as the treatments. This is to ensure the protection on human rights implementation, so that asylum seekers are not forcibly returned to their home country where they face prosecution.