

CHAPTER III

AUSTRALIA'S IMPLEMENTATION OF THE 1951 UNHCR CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEE

This chapter will tell about the relation between the UNHCR Convention and Australia as its signatory. It starts by giving some explanation about UNHCR and the Convention. It also will describe about the implementation of the Australia ratifying on the Convention. Then it explains about the implication and the problem of the ratification of the Convention for Australia.

A. UNHCR Profile

1. History of UNHCR

United Nations High Commissioner for Refugees (UNHCR) is one of United Nations agency concerning on refugees problem. It is also known as The UN Refugee Agency. The office of UNHCR was established on December 14th 1950 by the United Nations General Assembly¹. Now, it is based in Geneva, Switzerland.

Firstly, UNHCR emerged after the end of World War II to help Europeans displaced because of the war. It was ordered to help resettle those 1.2 million

¹ UNHCR. 'History of UNHCR'. *UNHCR website*. <<http://www.unhcr.org/pages/49c3646cbc.html>>

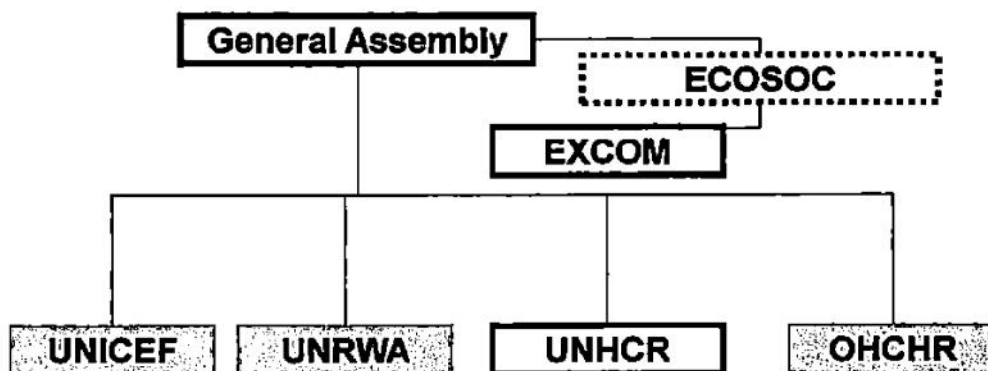
European refugees by a three-year mandate². But as the result of the refugee's problem became wider around the world, its mandate was extended every five years. Then in December 2003, the UN General Assembly decided to remove the time limitation on UNHCR's mandate until the refugee problem is solved³.

2. UNHCR's Structure

UNHCR is governed by the UN General Assembly and the Economic and Social Council (ECOSOC). The UNHCR Executive Committee (EXCOM), composed of 79 members, approves the agency's biennial programs and budget. These are led by the High Commissioner who is appointed by the UN General Assembly.

Figure 3.1

UNHCR under UN Structure



² UNHCR, 'What is UNHCR?', *UNHCR English website*, http://www.unhcr.no/en/Basics/to_help_ref_en.html accessed February 2 2011.

³ UNHCR, 'What is UNHCR?', *UNHCR English website*, http://www.unhcr.no/en/Basics/to_help_ref_en.html accessed February 2 2011.

Source: ANU College of Law⁴

The UNHCR has had 10 High Commissioners since it was established in 1950⁵. It was started with Gerrit Jan van Heuven Goedhart, a Dutch journalist and lawyer. Goedhart was on duty in UNHCR from 1951 – 1956. His achievements on behalf of refugees were acknowledged in 1954, when UNHCR was awarded its first Nobel Peace Prize. After Goedhart, he was followed by another former Switzerland journalist, Auguste Lindt, who had spent his term from 1956 – 1960.

Lindt was followed by another Swiss national, Félix Schnyder, who handed over to Sadruddin Aga Khan of Iran in 1965. The Aga Khan spent 12 years at the UNHCR helm, longer than anyone else, and he also worked for the organization before taking the top job. The next High Commissioner, Poul Hartling, from Denmark, was the first Prime Minister who led the agency. Hartling's eight-year term was marked by the mass exodus in Indochina and major operations in the Horn of Africa and Central America, as well as for Afghan refugees in Asia.

During his leadership, UNHCR was awarded the Nobel Prize for a second time in 1981. Jean-Pierre Hocké, another Swiss man, was High Commissioner from

⁴ ANU College of Law, 'UNHCR Structure and Functions', ANU website, <<http://law.anu.edu.au/UnitUploads/LAWS2234-1713-p1%20UNHCR%20STRUCTURAL%20CHART.ppt>>, accessed on May 17 2011.

⁵ UNHCR 'The High Commissioner' *UNHCR website* <<http://www.unhcr.org/pages/49c3646c8.html>>

1986 - 1989, followed by the brief stint of Norwegian politician Thorvald Stoltenberg who only lead the agency from January – November 1990. After Stoltenberg, Sadako Ogata became the first female High Commissioner for Refugees and she led the organization for 10 years from 1990 - 2000. Her tenure was marked by crises in the Balkans and the Great Lakes and the repatriation of 360,000 refugees to Cambodia. She was followed by Ruud Lubers, Netherland's Prime Minister, led UNHCR from 2000 – 2005. Currently, the UN General Assembly chooses Antonio Guterres, Prime Minister of Portugal, to lead this agency.

As head of the organization, the High Commissioner is responsible for the direction and control of UNHCR. High Commissioner directs the work of UNHCR with the assistance of a Deputy High Commissioner and Assistant High Commissioners for Protection and Operations. Beside the Executive Committee in headquarters in Geneva, UNHCR also has many UNHCR regional and sub regional office spread around the world that work in each country. UNHCR also has more than 7,000 national and international staffs working in 123 countries.

3. UNHCR's Work

Recent time, UNHCR is one of the world's principal humanitarian agencies. It is responsible for providing protection and assistance to the refugees around the world. As the humanitarian agency concerning on the refugees, UNHCR has two main aims that are to protect refugees and to seek ways to help them restart their lives

in a normal environment. In practice, UNHCR tries to guarantee refugee's basic right and to ensure that no refugee will be returned involuntarily to their country where they feel insecure.

UNHCR promotes international refugee agreements and monitors government compliance with international refugee law. UNHCR serves as the guardian of the 1951 Convention and 1967 Protocol. State parties are expected to cooperate with UNHCR in ensuring that the rights of refugees, as defined in the Convention, are respected and protected.

Most UNHCR operations are in the field. The worldwide operation has become highly complex, ranging from recruitment of new staff and ensuring their security in dangerous situations to the procurement of everything from medical supplies and bulk food shipments to aircraft charters. Its staff works in a variety of locations ranging from capital cities to remote camps and border areas, attempting to provide protection and to minimize the threat of violence that happened to the refugees, even in countries of asylum⁶.

Generally, international protection is the foundation of the way UNHCR working. Actually UNHCR not only help refugees but it also help people who have been granted protection on a group basis or on purely humanitarian grounds, but who have not been formally recognized as refugees, such as asylum seekers, stateless people and some of the internally displaced persons (IDPs).

⁶ UNHCR, 'Governance and Organization', *UNHCR website*,
<<http://www.unhcr.org/pages/49c3646c80.html>> accessed February 2 2011.

UNHCR not only has to protect the refugee's right, but it also gives assistance for them to solve the refugee's problem. UNHCR seeks solutions for the problems of refugees through some ways⁷:

a. Repatriation to the home countries

Many refugees intend return home once the situation in their country of origin stabilizes. In these circumstances, UNHCR encourages voluntary return by providing transportation, financial incentives and practical help such as seeds, farming equipment and building materials. UNHCR also ensure that a legal framework is set up to protect the returnees' rights and interests.

b. Integration in first countries of asylum

When voluntary repatriation is impossible, UNHCR helps them to integrate in countries where they first sought asylum. In many countries UNHCR offers in varying degrees support for local settlement projects in both rural and urban settings. It can be education, vocational training, and counseling to help refugees gain access to employment and the means to become independent. To promote the integration of refugees UNHCR also develops and designs projects to increase the public understands for the situation of refugees.

⁷ UNHCR, 'Finding Durable Solutions', *UNHCR English website*, <http://www.unhcr.no/en/Protect/durable_solutions_en.html> accessed February 2 2011.

c. Resettlement to Third Countries

Besides integrate in countries where they first sought asylum, UNHCR also provides assistance for refugee who want to go to one of some 16 states which regularly accept refugees for permanent resettlement. A number of countries have established refugee resettlement programs and receive annually a certain number of refugees within an established quota. UNHCR also encourages additional governments to extend opportunities to those refugees in need.

4. UNHCR in Australia

UNHCR regional representation for Australia, New Zealand, Papua New Guinea and the Pacific is based in Canberra. This representation focuses on three key areas of works⁸:

- a. The Legal Protection Unit liaises with governments in the region on refugee and asylum policy. It provides training for officials working with refugees and advises authorities on best international standards in respect to legislation, policy and procedures. UNHCR also monitors the application of the 1951 Refugee Convention in the region and intervenes in individual cases when they raise important issues of principle which set standards for the wider protection of refugees.

⁸ UNHCR Canberra, 'About UNHCR Canberra', UNHCR Regional Office website, <
http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=63&Itemid=34>.

- b. The Resettlement section works closely with the Australian and New Zealand immigration authorities on the composition of their quotas for resettled refugees and assists in the submission of individual cases.
- c. The Public Information Unit raises awareness about UNHCR's work and refugee issues amongst parliamentarians, schools, the media and the general public. It is the first point of contact for media in the region and can assist with inquiries on UNHCR's activities world-wide. The Regional Office also has a wide range of educational resources and display materials for teachers, community groups and the general public.

UNHCR Canberra is mandated by the UN General Assembly as UNHCR regional representation to monitor and supervise the application of the 1951 Refugee Convention pursuant to the preamble and article 35 of the 1951 Convention, article II of the 1967 Protocol, and the UNHCR Statute. In accordance with their works above, UNHCR Canberra's role and responsibility is to lead and coordinate action for the international protection of refugees who fall within the scope of the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR), and the pursuit of durable solutions for them⁹.

Although UNHCR has a supervisory responsibility in Australia in accordance with article 35 of the 1951 Convention, UNHCR does not have a direct role in

⁹ UNHCR, *Guidance To Legal Representatives, Advocates, Non-Government Organizations And Community Groups In Australia*, UNHCR Canberra, UNHCR Regional Representation Regional Office for Australia, New Zealand, Papua New Guinea & the Pacific.

refugee status determination in Australia. Decisions regarding the determination of refugee status in Australia are the responsibility of the Government of Australia. UNHCR may make recommendations to the Australia Government, in exceptional circumstances, in the basis of serious substantive or procedural concerns, doctrinal differences in the interpretation of the 1951 Refugee Convention, and/or cases which are illustrative of broader systemic issues within Australia's refugee status determination system. However, UNHCR has no power to overturn decisions made by the Australian authorities.

B. 1951 UNHCR Convention and 1967 Protocol relating to the Status of Refugees

1. The 1951 Convention relating to the Status of Refugees

The 1951 Convention relating to the Status of Refugees is the key legal document in defining who is a refugee, their rights and the legal obligations of states. It was approved on July 28th 1951 in special UN Conference. The 1951 Convention consolidates previous international instruments relating to refugees and provides the most comprehensive codification of the rights of refugees at the international level. In contrast to earlier international refugee instruments, which applied to specific groups of refugees, the 1951 Convention endorses a single definition of the term "refugee" in Article 1. The emphasis of this definition is on the protection of persons from

political or other forms of persecution. A refugee, according to the Convention, is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. This convention came into force on April 22nd 1954¹⁰.

The Convention not only clearly defines what the term refugee means. It also outlines a refugee's rights including such things as freedom of religion and movement, the right to work, education and accessibility to travel documents, but it also underscores a refugee's obligations to a host government. A key provision stipulates that refugees should not be returned to a country where they fear persecution. It also spells out people or groups of people who are not covered by the Convention.

2. The 1967 Protocol relating to the Status of Refugees

The 1967 is the complement of the 1951 Convention relating to the Status of Refugees, which in the first limited to protecting mainly European refugees in the aftermath of World War II. With the passage of time and the emergence of new refugee situations, the need was increasingly felt to make the provisions of the 1951 Convention applicable to such new refugees. As a result, a Protocol relating to the Status of Refugees was prepared.

¹⁰ UNHCR, 'The 1951 Refugee Convention', *UNHCR website*, <<http://www.unhcr.org/pages/49da0e466.html>> , accessed on June 9 2010.

The 1967 Protocol removes the geographical and time limitations written into the original Convention and expands the scope of the Convention as the problem of displacement spread around the world. After consideration by the General Assembly of the United Nations, it was opened for accession on 31 January 1967 and entered into force on 4 October 1967¹¹.

3. The Main Provisions of the 1951 Convention and the 1967 Protocol

After the 1951 Convention and the 1967 Protocol entered into force, there are 146 states have participated to one or both of those documents. The State parties should run the provisions of those documents. Generally, the 1951 Convention and the 1967 Protocol contain three types of provisions¹²:

- a. Provisions giving the basic definition of who is (and who is not) a refugee and who, having been a refugee, have ceased to be one. The discussion and interpretation of these provisions constitute the main body of the present Handbook, intended for the guidance of those whose task it is to determine refugee status.
- b. Provisions that define the legal status of refugees and their rights and duties in their country of refuge. Although these provisions have no influence on the process of determination of refugee status, the authority entrusted with this

¹¹ UNHCR, 'The 1951 Refugee Convention', *UNHCR website*, <http://www.unhcr.org/pages/49da0e466.html>, accessed on June 9 2010.

¹² UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 relating to the Status of Refugee*, UNHCR, Geneva, 1992.

process should be aware of them, for its decision may indeed have far-reaching effects for the individual or family concerned.

- c. Other provisions dealing with the implementation of the instruments from the administrative and diplomatic standpoint. Article 35 of the 1951 Convention and Article 11 of the 1967 Protocol contain an undertaking by Contracting States to co-operate with the Office of the United Nations High Commissioner for Refugees in the exercise of its functions and, in particular, to facilitate its duty of supervising the application of the provisions of these instruments.

C. The Implementation of the 1951 UNHCR Convention and 1967 Protocol

1. Australia's Obligation Under The 1951 UNHCR Convention and 1967 Protocol relating to the Status of Refugee

There are several reasons why it is important for a country to participate in the 1951 UNHCR Convention and 1967 Protocol relating to the Status of Refugee¹³:

- a. Shows a country's commitment to treating refugees in accordance with internationally recognized legal and humanitarian standards.
- b. Improves the possibility of refugees finding safety.
- c. Helps to avoid friction between States over refugee questions. If a particular country is already a party to the Convention, its act of granting asylum should

¹³ UNHCR, 'Signing on Could Make All The Difference', *UNHCR website*, <http://www.unhcr.org/3bbdb0954.html> . accessed on June 9 2010.

be understood by the refugee's country of origin as a peaceful, humanitarian and legal act, rather than a hostile gesture.

- d. Demonstrates a country's willingness to share responsibility for refugee protection.
- e. Helps UNHCR to mobilize international support for protection of refugees.

Australia is one of the state parties to the United Nations 1951 Convention and 1967 Protocol relating to the Status of Refugees. Australia ratified the 1951 Convention on January 22nd 1954 and the 1967 Protocol on December 13th 1973¹⁴.

Those convention and protocol provide an obligation for state parties that signed the Convention, including Australia. By signing and ratifying the Convention and its Protocol, Australia has obligation to¹⁵:

- a. Not return refugees to a country where they could face persecution (or the threat of persecution). It is also known as *non-refoulement* principle.
- b. Give protection to all refugees without any discrimination.
- c. Not penalize refugees for entering the country illegally, because people fleeing from persecution cannot be expected to leave their country and enter other country in 'normal' way.

¹⁴ UNHCR, 'State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol', *UNHCR website*, < <http://www.unhcr.org/3b73b0d63.html>>, accessed on June 9 2010.

¹⁵ Mary Crook et al *Future Seekers II Refugees and Irregular Migration in Australia*. The Federation

- d. Expel refugees only in exceptional circumstance to protect national security or public order.
 - e. Treat the refugees as a social and humanitarian problem, not because of the political tension between states.
 - f. Cooperate with other nations to find good solutions for refugee problems.
 - g. Cooperate with UNHCR in managing refugees globally.
 - h. Give the equal human rights to refugees that it affords to its citizens and non-residents, including right to work, education, housing, and welfare, freedom of movement and freedom of opinion.
2. Australia's Implementation of the 1951 UNHCR Convention and 1967 Protocol Relating to the Status of Refugee

As explain above, Australia as one of the state parties who ratified the 1951 UNHCR Convention and 1967 Protocol Relating to the Status of Refugee has several obligations should be run by Australia. Australia has enacted its obligations under the Convention through several acts. Those acts are The Migration Act 1958 and The Migration Regulations 1994.

The Migration Act 1958 was passed in October 8 1958. Firstly, this act was introduced to abolish the Dictation Test under the White Australia Policy¹⁶. Then after the signing of the 1951 Convention, the government also enacted their

¹⁶ Megan Wood, 'Immigration: Australia's Changing Face', *Enhance TV website*,
<http://www.enhancetv.com.au/features/history/immigration/immigr>

obligation under the Convention into the Migration Act 1958. It can be seen from some part of the act that allows for the grant of a protection visa where the applicant is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Australia's The Migration Act 1958 also becomes one of the guidance for Australia immigration process.

Beside the Migration Act 1958, the Australia government also added some regulation in migration including which is related to the Australia's obligation under the 1951 UNHCR Convention and 1967 Protocol Relating to the Status of Refugee. The Migration Regulations 1994 was passed in September 1 1994. It set out the criteria for grant of a visa to remain lawfully in Australia which extends a range of rights and obligations to refugees as provided by the 1951 Refugee Convention. Schedule 1 of the Migration Regulations also describes the particular classes of visas for which a non-citizen may apply, which includes Protection (Class XA) and Refugee and Humanitarian (Class XB) visas. Schedule 2 stipulates the provisions with respect to the grant of subclasses of visas, including the requirement that the applicant satisfies public interest criteria (PIC) 4001, 4002 and 4003/4003A¹⁷.

¹⁷ UNHCR Canberra, 'Submission by the Office of the United Nations High Commissioner for Refugees: 2011 Independent Review of the Intelligence Community', April 1 2011, UNHCR website, <http://www.unhcr.org/au/unhcr/images/2011-04-01_Submission%20-%202011%20Independent%20Review%20of%20the%20Intell.pdf>, accessed on June 30 2011.

3. **Problems Arise after Australia's Ratifying on the 1951 UNHCR Convention and 1967 Protocol Relating to the Status of Refugee**

Australia's commitment to sign the United Nations 1951 Convention and 1967 Protocol relating to the Status of Refugees has implications and consequences for Australia. Those implications and consequences are the problems that should be faced by the government. Not only related to the increase of migrants who came to Australia, it also has influenced socially, economically and politically.

These are some of problems arise after Australia's ratification of the UNHCR 1951 Convention relating to the Status of Refugees and the 1967 Protocol to Australia¹⁸:

- a. Since becoming a signatory of the UNHCR 1951 Convention relating to the Status of Refugees and the 1967 Protocol, it has indirectly led to a demonstration effect for citizens in areas prone to conflict to seek asylum in Australia. It causes the large number of refugees and asylum seekers come to Australia.
- b. Economically, Australia has heavier burden for the responsible to the social security that must be met for migrants who came into Australia. The assurance covers basic living needs such as food, drink, temporary shelter, health facilities and education facilities, as listed in the UNHCR 1951 Convention relating to the Status of Refugees and the 1967 Protocol. In

¹⁸ Agus Nilmada Azmi, 'Kebijakan Pemerintah Australia Mengnai Imigran Ilegal Pasca Insiden Kapal Tampa', *UI digital library website*, <<http://www.lontar.ui.ac.id/file?file=digital/80452-T%2013807-Kebijakan%20pemerintah.pdf>>, accessed on April 4 2011

addition, the Convention was not designed as to be a burden-sharing mechanism.

- c. Politically, the issue of granting political asylum can also affect diplomatic relations between Australia and the origin country of asylum seekers, especially for the political asylum who have problems with the regime in their country.
- d. Socially, after Australia signed the convention, the government committed to implementing the multiculturalism policy. It aims to accommodate their participation as a signatory of the UNHCR 1951 Convention relating to the Status of Refugees and the 1967 Protocol. In Australian community itself there are pros and cons of this policy. On the one hand, the groups supporting the policy urged the government to implement policies fairly and consistently. While on the other hand there are other groups who oppose this policy asked the government to act carefully in providing entry permits to migrants to reduce social conflict between Australian citizens with migrants who have different social cultural backgrounds. This is due to the large number of migrants who come from different countries with different cultural backgrounds had led to various kinds of social pressures in the Australian