

The ‘Living’ Need for the Regulation of Refugee Status

Odorige Catherine Enoredia

PhD student National University of Public Service Budapest

In 2011, Antonio Guterres, former United Nations High Commissioner for Refugees, made an appeal to non-signatory countries of the 1951 Refugee Convention and its 1967 protocol to accede to it by ratification. He also pledged full support to governments who comply with this appeal.¹ However, countries who are already signatories to this Convention are facing dire challenges in coping with refugee influxes and some even have arguably violated Article 33 of the 1951 Convention, also known as the principle of non-refoulement.

The challenges faced by countries in keeping to their promises to protect refugees are enormous. First of all, these states have security concerns: recent evidence uncovered in Europe has shown that terrorists are often mixed with refugees. Secondly, the changing dynamics of the human trafficking networks and their methods of operation also present a huge challenge – these human traffickers are taking advantage of the vulnerable group of asylum seekers, and they also encourage economic migrants to embark on life risking journeys making huge profits in the process. The insufficient facilities and the cost of caring for sudden arrivals of large number of refugees are a challenge for the receiving states. Finally, the fear – strongly expressed by right wing populist political parties – of the possible refugee influxes is changing the social dynamics of countries in Europe, through religion (Islamophobia) and through the fear of undermining hosting states cultures and values.

This paper seeks to introduce the historical relevance of the 1951 Refugee Convention and the challenge signatory countries face when implementing its provisions, with an overview of the new challenges to the Convention that discourage states from acceding to it. Furthermore, the paper proposes the possibility of the Refugee Convention to be treated as a ‘living’ document in light of the new challenges of the refugee phenomenon.

Keywords: Refugees, Asylum seekers, European Union, Universal Human Rights, ‘Living’, UNHCR

1. Introduction

Global recognition and the enforcement of fundamental human rights is the basis of refugee protection. Since the drafting of the Universal Declaration of Human Rights (1948), there is a never-ending discussion within the international community about how to secure universal and inalienable human rights. It has been reported that some states doubted the possibility of having universal values on human rights during the drafting of the document.

Human rights are such rules or norms that are expected to provide protection for individuals and groups from social, political and legal abuses. Many conflicts between individuals, citizens, settlers, religious

¹ Antonio Guterres: Personal Appeal to non signatory states to accede to the 1951 convention and the 1967 Protocol, on the opening pages of The Legal Framework for Protecting Refugees as it relates to 1951 Covention Relating to the Status of Refugees and its 1967 Protocol, UNHCR, Geneva Switzerland, September 2011.

or ethnic minorities and those who have the prerogative of power remain unresolved and their situation may deteriorate and lead to the loss of lives and threat to life regarding groups, leading to a loss of confidence in the state to provide protection. The on-going political challenge in Syria is a case in point. The situation there has deteriorated into a civil war with media reports on the perceived enemies of the Syrian state being tortured by the regime and a large civilian population caught in the crossfire. The right to asylum gives the individual the right to some alternatives, like moving out of the dangerous zones and seeking asylum elsewhere due to threat to their lives, rather than surrendering to the political manoeuvres and/or violence that is capable of silencing them forever. The refugee therefore is successfully presented and explored as the figure of the inter or the in-between of the human way, as being a figure of the-inter of international relations as well as a figure of international abjection that is essential for the political subjection of modern politics.² The seemingly hopeless and persecuted man's renewed hope is a result of international law and international relations. Unfortunately the hope of finding succour after moving out of the 'enemy territory' can be short-lived when victims of conflicts cannot benefit from the international provisions to seek asylum.

The increasing rates of wars, conflicts and displacements prove that the regulation of refugee status is very relevant, based on the fact that civilian populations are the main victims of conflicts. The difficulty of accessing international protection comes from the fact that countries have failed to comply with the obligations of the 1951 Convention or have refused to be signatories. Internal politics of countries and the politicization of refugee challenges – as political aspirants use the refugee challenge in arguments in order to succeed in elections, are some of the reasons for their reluctance. The changing dynamics of internal and international politics are such factors that can lead to unresolved conflicts and violence that could indicate mass influxes of refugees cutting across continents. This consideration was what prompted the United Nations General Assembly to adopt The New York Declaration on 19 September 2016, which recognised positive, voluntary and enriching global mobility, but on the other hand it raised awareness that the growing number of people forcibly displaced from their homes is at a historical high level and more and more refugees and migrants are moving to where their lives are not at risk (often assisted by traffickers). When they arrive where they can seek for asylum, their number can be overwhelming for the host country, especially where refugee facilities are relatively small.³

1.1. The Refugee Act of 1951 and the 1967 Protocol

Prior to the 1951 Refugee Convention, which is the key legal document and the centrepiece of international refugee protection, the majority of the leaders of countries came together and decided to compile a UN Charter for Fundamental Human Rights, a road map that would guarantee such fundamental rights as the freedom to life, speech, association and affiliation for individuals. Atrocities (antisemitism and ethnic cleansing) experienced during the Second World War redounded this decision. President Franklin Roosevelt of the United States had called for the recognition of four essential freedoms, such as freedom of speech, freedom worship, freedom from want and freedom from fear. Roosevelt's statements were only a part of the movement that gathered strength in the 1940s' and which aimed to make human rights protection part of the conditions that had been set up to guarantee peace at

² M. Dillon, *The Scandal of the Refugee: Some Reflections of the Inter of International Relations and Continental Thought*, in Campbell David & Shapiro Michael (Eds), *Moral Spaces: Rethinking Ethics and World Politics*, University of Minnesota, Minneapolis, 1999 pp. 92-124.

³ United Nations General Assembly: *New York Declaration for Refugees and Migrants*, 2016 http://www.un.org/ga/search/view_doc.asp?symbol=A/71/L.1 (18 February 2017)

the end of the Second World War.⁴ Eleanor Roosevelt, widow of the late American President chaired the Committee that drafted the Universal Declaration of Human Rights with members cutting across various political, cultural and religious backgrounds.⁵ The desire for the recognition of fundamental human rights might have been founded on the premise that natural rights of man – which are the right to life, right to personal freedom and the right to property – had been subjugated by group ideologies of ethnicity, religion and political thoughts over the ages, perpetrated by the states or elites who had the prerogative of control. Their activities have led to conflicts and wars, inflicting violent attacks on the civilian population without any recourse to their right to life and dignity.

What are the most relevant provisions of the 1951 Refugee Act and the 1967 Protocol exactly?

The first definition of refugees dates back to 1926, when the League of Nations declared it as someone who stays outside of the country of origin and lacks the protection of the government of that state. This definition is sufficiently related to the mass migration from the USSR and similar to the provision of Article 1 of the 1938 Convention on the Status of Refugees coming from Germany, which referred to a refugee as a person of German heritage fleeing Germany because they have lost the protection of the German state.⁶ After the 1951 Convention the definition extended to read as follows (Art. I):

“...any person who is outside of the country of his nationality or if he has no nationality, the country of his former habitual residence, because he has or had a well-founded fear of persecution by reason of race, religion, nationality or political opinion and is unable or because of such fear is unwilling to avail himself of the protection of the government of the country of his nationality or, if he has no nationality, to return to the country of his former habitual residence⁷, could be considered as a refugee.

The reluctance to accede to and implement the refugee status treaty is grounded in Article 14(2) of the Universal Declaration of Human Rights 1948, which states that; “...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.”⁸ There were also reports that the preparation of the document was riddled with arguments about it being based on Western ethno-centrism. This presumption can be referred to as unfounded, but seemed to be sustained, because supporters of the document either forgot or were not sure how to respond to these charges. A peek into the history of the referenced Western nations – whose values were thought to have been translated into the drafting of the document – shows that not all was rosy regarding human rights in the ‘Western hemisphere’, for example the government practices in 19th and 20th century, Western societies like Fiefdom, Patriarchy, Nazism, Fascism, and Authoritarianism as epitomised in Stalinism and Leninism. Human rights were not a primary consideration in these regimes. The promoters of human rights aimed to keep such outright disregard for human rights in check through the Declaration. On the reverse side, history has shown recognition of human rights and dignity in non-European pre-colonial societies as far back as 18th century BC; evidence of human rights in social, political practices were embedded in the ancient religions in Asia as well.⁹

⁴ United Nations, *History of the Document, Universal Declaration of Human Rights*

⁵ United Nations, *History of the Document, Universal Declaration of Human Rights* <http://www.un.org/en/sections/universal-declaration/history-document/> (18 February 2017)

⁶ G. Goodwin-Gill, *The Refugee in International Law*, 2nd edn., Oxford University Press, New York, 1996 p. 4.

⁷ Ibid p. 8.

⁸ UN, Universal Declaration of Human Rights http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (23. May 2017) p. 30.

⁹ F. Lenzerini, *The Culturalization of Human Rights Law*, Oxford University Press, 2014, p. 34.

Notes during the deliberations, prior to the adoption of the refugee status convention show evidence that representation for the drafting of the refugee law cut across continents. So what are the issues surrounding its application?¹⁰

Law or law-making (in general) is considered to be effective if it is respected by all or by a greater percentage of those that are bound by it. In international law, the degree of effectiveness of treaties is related to the degree of signatories who abide to it.¹¹ When there are too many cases of non-compliance, effectivity may be questioned.

Article 33 (1) of the 1951 Convention on the Statutes of Refugees addresses the principle of non-refoulement. It states that “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Recently, the world has witnessed the alleged refoulement of asylum seekers. Unfortunately, signatories to the Convention are among violators of this Article, and all have been able to present good reasons why they were unable to honour their obligations, even if on the other hand the UNHCR – the body responsible for keeping watch over of the Refugee Convention – could only see populations desperately in need of help.¹²

2. Violation of the Non-Refoulement Principle

The universally accepted human rights norms are evidenced by the Universal Declaration of Human Rights, and still the application of the Refugee Convention remains problematic. Despite the different rhetoric of the states, they are simply not willing to limit their sovereignty in favour of the essential dignity of man.¹³ Article 31 of the Convention clarifies the issues of illegal entry, that as long as the asylum seeker can present himself/herself to the authorities within a short period from entering the host territory, he/she may not be liable to punitive measures like detention. Unfortunately, to detain asylum seekers is becoming a frequent practice, as states take advantage of paragraph 31(2) of the 1951 Convention, which gives the right to states to impose necessary restrictions, which can include security concerns, or special circumstances in case of large influxes. By now this paragraph has become a justification for detaining asylum seekers, as well as for the use of ‘push backs.’

The Australian government is a signatory to the 1951 Convention on the Statutes of Refugees. Successive Australian governments have made weighty investment in an attempt to combat human trafficking and transnational organized crime in Southeast Asia. This culminated in the formation of the Bali Process on People Smuggling in 2002.¹⁴ The initial focus was to stop the people smuggling networks that help to facilitate irregular movements into Australia. Several efforts were made in an attempt to push back the smugglers trying to reach Australia. This includes turning back smugglers’

¹⁰ Final Act of United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons 25th July 1951 <http://www.unhcr.org/protection/travaux/40a8a7394/final-act-united-nations-conference-plenipotentiaries-status-refugees-stateless.html> (29 April 2017)

¹¹ A. Macfarlane, *What makes a law Effective?* http://www.alanmacfarlane.com/TEXTS/law_effective.pdf p.1. (29 April 2017)

¹² See for example: <http://www.unhcr.org/afr/news/latest/2016/3/56dec1546/unhcr-expresses-concern-eu-turkey-plan.html> (23 May 2017)

¹³ J. Hathaway, *The Rights of Refugees Under International Law*, Cambridge University Press, New York, 2005 pp. 16.

¹⁴ The Bali Process comprises of 48 members including UNHCR, IOM, the United Nations Office of Drugs and Crime as well as observer countries and other international agencies. It is co-chaired by the Australian and Sri Lankan Authorities. <http://www.baliprocess.net/> (20 April 2017)

boats and handing them to Sri Lankan or Indonesian authorities, depending on the direction the boats had arrived from. The asylum seekers on board such vessels who are returned stand the risk of prosecution for leaving their country illegally. This has not had much deterrence on the smugglers who also have asylum seekers among their clients from Afghanistan and Iran, who reach South-East Asia legally and are ferried by them into Australia illegally.¹⁵ Other measures were also adopted by the Australian government which included a deal with the authorities on Nauru Island and Papua New Guinea to use their territories as processing points for asylum seekers.¹⁶ Human rights abuses of the asylum seekers and refugees, even with young children among them have been carried out by the Australian contractors who provide service on the islands, and also by the inhabitants of the island. There are reports by Transparency International and other human rights watchers about these violations.¹⁷ These attempt to stop the people smugglers and their patrons, who are desperate to reach Australia has put the Australian government in contravention of Article 33 of the 1951 Refugee Convention. That Article states that “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁸ Despite outright condemnation against its actions both internally and internationally, the Australian government has vowed to continue with its methods, stating expressly that the refugees will not be settled in Australia.¹⁹ Refugee experiences on Nauru Island and Papua New Guinea are documented in an extensive report by Amnesty International with gory description of mental torture that the asylum seekers are subjected to.²⁰ The action of the Australian government, security officials and the contractors representing the government is a violation of various legal instruments. In the broadest and most general terms, prohibition on refoulement proscribes the forced removal of an individual to a country where he/she runs the risk of being subjected to human rights violations.²¹ Human rights abuses carried out on the territories of signatory countries like Australia are linked, and those are tantamount to the destruction of the human spirit, an offence for which there is no law.

In the asylum policy field there is no doubt that states take into account the practice of other states when it comes to tightening the rules on entry, entitlements, and border security.²² The Australian model is getting international attention, with reports about Australia’s politicians attempting to recommend it to other countries. A highlight of this was the attempt of the prime minister, who legitimized his action internationally by trying to popularize it before the United Nations General Assembly in 2016.²³ Also Phillip Ruddock, longest serving Australian immigration minister had presented a volume, titled *Interpreting the Refugee Convention: an Australian Contribution* in 2002 at the UNHCR executive committee meeting. While calling his action an intellectual contribution of his department to

¹⁵ J. Song, *Australia and the Anti-Trafficking Regime in South East Asia*, Lowy Institute for International Policy, November 2016. <https://www.lowyinstitute.org/publications/australia-and-anti-trafficking-regime-southeast-asia> (20 April 2017)

¹⁶ <https://www.theguardian.com/world/2016/aug/10/a-short-history-of-nauru-australias-dumping-ground-for-refugees> (20 April 2017)

¹⁷ Human Rights Watch *Australia: Events of 2015* <https://www.hrw.org/world-report/2016/country-chapters/australia> (20 April 2017)

¹⁸ OHCHR <http://www.ohchr.org/Documents/ProfessionalInterest/refugees.pdf> (20 April 2017)

¹⁹ <https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention> (6 March 2017)

²⁰ N. Beams, *Amnesty report: Australian Government Running Torture Detention on Nauru*, International Committee of the Fourth International (ICFI) 2016 <http://www.wsws.org/en/articles/2016/10/18/amne-o18.html>. (6 March 2017) p.1.

²¹ K. Wouters, *International Legal Standards for the Protection From Refoulement*, Intersentia, Oxford 2009 p. 9.

²² J. McAdam, *Migrating Laws? The Plagiaristic Dialogue Between Europe and Australia* in Lambert Helen, McAdam Jane & Fullerton Maryellen, *The Global Reach of European Refugee Law*, Cambridge University Press, United Kingdom, 2013 p. 25.

²³ UN Refugee Summit: *Malcolm Turnbull and Peter Dutton Tout Australia’s Immigration Policy*.

international discussion he started a debate on the interpretation of the refugee convention and recommended that acceding states should be given the privilege to determine to what extent and manner they choose to augment the Convention's Provisions.²⁴

The unresolved conflicts in the Middle East have brought refugee influxes to Europe, climaxing in the summer of 2015. Hungary lies on the Eastern and South Eastern migration route as a gateway into the European Union on the Balkan side. Human traffickers and asylum seekers tend to use this route to enter the European Union. In the summer of 2015, Europe experienced throngs of asylum seekers trying to enter the European Union through the Hungarian border. The Hungarian government's reaction to the refugee surge is an evidence that other countries are beginning to follow the example of the Australian government's 'no visa – no entry' policy. During the migrants' influx, estimated numbers show that two thirds of their numbers were fleeing the wars from Syria, Iraq and Afghanistan. They were seeking refuge in Europe through the Hungarian border, yet the Hungarian government has chosen to qualify most as economic migrants, and passed a law which made it illegal for refugees to enter the country in contravention of the law. The Hungarian Prime Minister reinforced his position in a press conference in Brussels on 3rd of September 2015 stating that migrants are not welcome in Hungary. Following this statement, a 175-kilometre-long fence was built along the Serbian-Hungarian border, which had been the main entry point for asylum seekers seeking to enter Hungary. Also, a government decree came into force regarding refugees in 2015,²⁵ designating so-called safe countries. The government's position was that asylum claims could have been lodged in Serbia which is also a signatory to the Refugee Convention, therefore, there was no need to apply for asylum in Hungary as it should have already been done in Serbia. This is the basis for the quasi-automatic rejection of all asylum cases lodged in Hungary by asylum seekers who gained entry into the country through the Serbian border. This position taken by the Hungarian government has been stated by the Helsinki Committee to be contrary to the position of the UNHCR and the Hungarian Supreme Court.²⁶ Asylum seekers are denied the chance to challenge this rejection on the merits, which is contradictory to EU law which prescribes that asylum cases can be examined individually. The legal officer of the Helsinki Committee noted that the challenges asylum seekers could face in Hungary, for example, during the implementation of the decree and the Asylum Act also violate the Charter of Fundamental Rights of the European Union according to an interpretation of the European Court of Justice.²⁷ These legal amendments by the Hungarian government and the implementation of the asylum procedure which resulted in the detention of asylum seekers for several months are indicative of the fact that Hungary is no longer willing to honour its legal and moral obligation to provide protection for asylum seekers. Rather than see these groups as persons are seeking international protection and fleeing war and conflicts from places like Syria, Afghanistan, Somalia and Iraq, government communication prefers to label these groups as economic migrants or illegal immigrants whom the Hungarian government has no obligation to protect by law. The Hungarian government is not alone in the construction of fences to keep out migrants, neither is it the only country in Europe looking for legal channels to keep out the migrants and asylum seekers. Other countries

²⁴ J. McAdam, *Migrating Laws? The Plagiaristic Dialogue Between Europe and Australia* in Lambert Helen, McAdam Jane & Fullerton Maryellen, *The Global Reach of European Refugee Law*, Cambridge University Press, United Kingdom, 2013 pp. 65-66.

²⁵ Government Decree 191/2015 (VII.21) *On national designation of safe countries of origin and safe third countries.*

²⁶ G. Matevzic, (2015), *No Country for Refugees: New Asylum Rules Deny Protection to Refugees and Lead to Unprecedented Human Rights Violation in Hungary.* Hungarian Helsinki Committee 2015, p. 1.

²⁷ *Ibid.*

include Croatia, Austria, Slovenia, Macedonia, Bulgaria, Spain, Serbia and Italy are also implementing strategies to keep asylum seekers out.²⁸

Kenya holds the biggest refugee camp in the world known as the Dabaab Camp. Here the UNHCR has been providing relief and protection for displaced persons and asylum seekers from Somalia and other conflict zones in the region. Terror attacks on the Kenyan state prompted the Kenyan government to close down the camp. The Kenyan High Court ruled against the government's decision, and this ruling was described by a UN representative in the region as positive, stating that the proposal by the government stands in violation of the non-refoulement principle. The Kenyan government's decision was informed and based on security concerns that terror attack against the Kenyan state will be launched by Al-Shabaab – linked to al-Qaeda terrorist organisation - from the refugee camp, therefore the camp is a risk to the Kenyan people. The Kenyan government made a statement that "Kenya and its people come first". Meaning that the government is willing to renege its obligation to the 1951 Refugee Convention and the 1969 African Union Convention if it puts the life of the Kenyan people at risk.²⁹

3. Refugee Voices and Voices Against Refugees

Public opinion has turned against refugees as their numbers have swollen from 2.5 million to 23 million in between 1970 and 1995.³⁰ Stories told by refugees confirm the above stated.³¹ According to the United Nations High Commissioner for Refugees (UNHCR) the estimated number of forcibly displaced people was 65.3 million in 2015³². About 12.4 million were newly displaced in 2015, and applications for asylum were on a record high. Among affected countries Germany had the highest number of asylum seekers with 441,900 asylum claims, USA came second with 172,700, followed by Sweden with 156,400 and the Russian Republic with an estimated 152,500 applications.³³ No doubt, these mass influxes have brought serious political debates in many states, especially in Europe and have turned public opinion against refugees, which could be seen as the reason for the rising right-wing nationalism in many European Union Member States and in the author's view strongly influenced the decision on BREXIT and is a part of what influenced the election of Donald J. Trump as the 45th president of the US. Like in many EU Member States, Germany's acceptance of large numbers of refugees has brought division and debates in the nation and led to the growing popularity of a right wing populist party, Alternative for Germany.³⁴ Also the open door policy of the Swedish government has turned a reasonable number of the population against migrants.³⁵ The growing public voice against migrants has spread across countries in Europe. Canada also took in large numbers of refugees too, and the media

²⁸ <http://www.businessinsider.com/map-refugees-europe-migrants-2016-2> (10 January 2017)

²⁹ See the Financial Times report on Kenyan High Court decision against the government decision to close the Dabaab refugee camp in Kenya. <https://www.ft.com/content/1a7c8494-ee9-11e6-930f-061b01e23655> (23 May 2017)

³⁰ Mertus Julie, Tesanovic Jasmina, Metikos Habiba, Boric Rada, (Eds) *The Suitcase*, University of California Press London England 1997 p. 8.

³¹ Ibid pp. 23-41.

³² This number is representative of the 21st largest country in the world if it were to be a nation, according to the UNHCR.

³³ UNHCR, Global Trends Forced Displacement 2015.

³⁴ Anti- Migrants attack on the Rise in Germany. <https://www.rte.ie/news/2017/0226/855632-anti-migrant-attacks/> (11 March 2017)

³⁵ Swedish Two-Year Turn: *How liberal Refugee Policy Turned Public Against Migrants* <http://www.express.co.uk/news/world/768733/Sweden-migrants-latest-refugee-policy-demos-report> (23 May 2017)

debated whether this could have influenced a lone attacker who opened fire on a mosque that left 6 people dead.³⁶

4. Interpreting the Convention as a Binding Document

Four main methods have been identified for the interpretation and implementation of international treaties. These are good faith, the treaty text, the context of the treaty and its object and purpose. In the implementation process proper interpretation of all of these elements have to be taken into account.³⁷

Good faith indicates a moral element when interpreting a treaty, with prohibition of manifestly absurd or unreasonable interpretations.

Reference to the text indicates a textual or literary approach, as a treaty has to be interpreted in accordance with the ordinary meaning given to its terms.

Context to the systematic approach indicates that the treaty has to be taken into account as a whole including the preamble and annexes as well. Abstract meanings could not be made. Meanings are generated only after considering the context in which it is applied.

Finally the object and purpose of the treaty indicates a teleological interpretation.³⁸ As espoused by the principle of ‘contemporaneity’ which states that treaty provisions should be interpreted the meaning attributed to it at the time of its conclusion.³⁹

Emphasis is put on the importance of time, as an increasingly significant element in the interpretation of multilateral treaties like the 1951 Refugee Convention, as it is expected to be valid for a long time. New dynamics of the refugee situation raise the question of whether the document is to be treated as a living instrument, meaning that interpretations could change to cope with new dynamics.

Structuring the 1951 Refugee Convention as a *living* instrument is for the treaty to be compatible with present day issues that are changing from time to time, accordingly there should be a preference for dynamic and evolving interpretation in light of new social and political developments. In reference to the Constitution of the United States, Strauss defines a living constitution as one that evolves, changes overtime and adapts to new circumstances. He claims that there is no reasonable alternative to a “*living*” constitution especially as the world has changed in incalculable ways.⁴⁰ Accordingly a constitutional document should be “a boss and not a dictator”, being the boss with regards to the document could be synonymous with a democratically elected legislature or representatives of the various nations in the UN during the adoption of the 2016 New York Declaration.

Strauss defends the *living* documents with the claim that they do not conceal the real basis of the document, but help in making resourceful decisions which originally may not be on hand to deal with new challenges.⁴¹ With over sixty years of existence it serves the purposes of the 1951 Refugee Convention the best if it is treated as a living document, in light of the new dynamics of modernity.

³⁶ Six Dead in Quebec Mosque Shooting <http://edition.cnn.com/2017/01/29/americas/quebec-mosque-shooting/> (23. May 2017)

³⁷ K. Wouters, *International Legal Standards for the Protection From Refoulement*, Intersentia, Oxford, 2009, p. 8-9.

³⁸ Ibid. p. 9

³⁹ Fitzmaurice Malgosia & Olufemi Elias, *Contemporary Issues in Law of Treaties*, Eleven International Publishing, 2005 p. 219.

⁴⁰ D. Strauss, *The Living Constitution*, The Chicago Law School Alumni, 2011 <http://www.law.uchicago.edu/alumni/magazine/fall10/strauss> (22 February 2017)

⁴¹ Ibid.

The recent New York Declaration for Refugee and Migrants is an attestation of the need to treat the refugee Convention as a living document, as new challenges to the refugee and migrant situation were discussed to find ways to plot a new course in refugee protection in two significant ways. (a) The agreement by states on a Comprehensive Refugee Response (CRR) framework for large scale refugee movement including protracted situation grounded in the principle of international cooperation and responsibility sharing; and (b) States agree to adopt global documents on refugee protection in 2018. The agreement is meant to ease pressure on host communities and make the refugees more self-reliant, and to expand third country solutions and to make and support conditions in the countries of origin for safe returns in dignity.⁴² One major problem surrounding the institution of refugee protection is the increasing number of human trafficking networks and their desperate race for profit that they procure for transporting refugees, as well as the concept of economic migrants often being confused with asylum seekers.

No doubt that the issues of good faith, object and purpose of the Refugee Convention are still relevant as refugees hopes are renewed when they receive international protection. The main issues that need to be addressed are the interpretations challenged by changing times and the new dynamics of conflicts, wars and international relations as they interact with the Refugee Convention.

4.1. The Efforts of the European Union

The Ad Hoc Immigration Group was set up in 1987 to limit access into Europe and to reinforce external border control. This aimed to allow the operation of the Single Market and the Schengen acquis which meant breaking down internal border control between the EU Members States to secure the free movement of goods, persons, services and capital. The Amsterdam Treaty of 1997 could be considered as a major milestone in the European asylum and immigration system, as it kick-started supranational European in the non-criminal policy fields of the area of freedom, security and justice. Equally important were the Tampere Conclusions (1999) of the European Council. This gave a new legal objective to asylum and immigration policy, based on the respect for human rights, democratic institution and the rule of law.⁴³

Consequently the key legislative instruments of the Union's asylum policy were adopted: the Asylum Procedures Directive, the Dublin Regulation, the Qualification Directive, the Reception Conditions Directive, the Eurodac Regulation and the Temporary Protection Directive. All these measures are central to the Common European Asylum System (CEAS) which contains key substantive and procedural rules, defining the right to asylum in the EU without breaching the principle of non-refoulement. The Dublin III rules and the safe country rule are crucially important provisions in the CEAS.⁴⁴ The EU's effort is to coordinate the asylum procedures as they relate to the concept of free movement within the European Union, and it has obligated Member States to always consider the rights of refugees and to avoid to be in violation of EU regulations. The formal infringement notices against Hungary⁴⁵ as a result of non-compliance with EU provisions are evidence of the regular investigations

⁴² UNHCR, UN Refugee Agency, *New York Declaration* 2016 <http://www.unhcr.org/584689257.pdf> p. 3. (22 February 2017)

⁴³ Lambert Helen, McAdam Jane & Fullerton Maryellen, *The Global Reach of European Refugee Law*, Cambridge University Press, United Kingdom, 2013, p. 17.

⁴⁴ Ibid.

⁴⁵ European Commission, *Infringement Procedure Against Hungary*, Migration and Home Affairs https://ec.europa.eu/home-affairs/what-is-new/eu-law-and-monitoring/infringements_en?country=1607&field_infringement_policy_tid=1598 (15 March 2017)

that the European Commission carries out during the implementation of asylum and refugee procedures in Member States. Apart from the media, monitoring bodies and non-governmental organizations like Transparency International carry out their own investigations and publish the (alleged) violations of refugee rights. The European Commission under the EU Trust Fund for Africa is also partnering with the Libyan authorities to manage the migration flows on the Mediterranean and to save lives and reduce the number of crossings and also to step up the fight against smugglers and traffickers.⁴⁶

The European Union set up the Asylum, Migration and Integration Fund (AMIF) to run for a seven year period between 2014-20, with a total amount of 3.137 billion euros. Its main goal is to promote the efficient management of migration flows and the development of implementation and to strengthen the common EU approach in asylum and immigration. This Fund contributes to the achievement of four specific objectives:

- Strengthening and developing the Common European Asylum system by ensuring that EU legislation in this field are efficiently and uniformly applied;
- Supporting legal migration to EU States in line with the labour market needs and promoting the effective integration of non-EU nationals;
- Enhancing fair and effective return strategies, which contribute to combating irregular migration, with an emphasis on sustainability and effectiveness of the return process;
- Making sure that EU States which are most affected by migration and asylum flows can count on solidarity from other EU States.⁴⁷

Evidence of the impact of the AMIF on the integration of third country nationals in Europe is the number of third country nationals who have been equipped with vocational skills that will enable them to have access to employment.⁴⁸ The AMIF empowers NGO's especially in affected Member States through projects to provide these skills. Non-Governmental organisations also aim to create social cohesion to transform fear into compassion through the AMIF.

Furthermore the role of the European Court of Justice as it concerns provisions of the Refugee Convention, in areas such as cessation of refugee status, exclusion from refugee status or provisions relating to subsidiary protection cannot be overlooked. Once the Court of Justice answers a reference in its preliminary ruling procedure, this interpretation carries great weight as a quasi-precedent in EU law.⁴⁹

5. Recommendations and Conclusion

The dynamics of present day international relations are ripe with protracted conflicts which tend to defy regional or international solutions. Countries involved in these crisis are the main output countries of large refugee influxes. The civilian populations are usually the victims of such unresolved political challenges. This makes the 1951 Convention relevant for persons who will flee from a country in order to be able to have access to international protection.

The UNHCR has traditionally argued that it does not have a general competence for Internally Displaced Persons (IDPs), though it had relief and rehabilitation programs for those displaced within a country since 1972. However, in cases where there is a specific request by the UN Secretary General and with

⁴⁶ http://europa.eu/rapid/press-release_IP-17-951_en.htm (12 April 2017)

⁴⁷ European Commission, Migration and Home Affairs https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund_en (23 May 2017)

⁴⁸ http://europa.eu/rapid/press-release_MEMO-15-5717_en.htm (23 May 2017)

⁴⁹ Lambert Helen, McAdam Jane & Fullerton Maryellen, *The Global Reach of European Refugee Law*, Cambridge University Press, United Kingdom, 2013, p. 18.

the consent of the State concerned it has been willing to respond by assisting IDPs in a number of instances.⁵⁰ This has become somewhat inadequate in light of the present realities. Victims of famine as a result of drought or flooding and other natural disasters are forced to join those who are seeking international protection, because there is yet to be a concerted effort for response by states or the international community for victims of internal displacement as a result of natural disasters and emergencies. There is a need to strengthen the functional internal displacement department under the UNHCR that can work in the field to provide basic necessities, as well as continuing educational arrangements for internally displaced persons. A recurring reason given by internally displaced populations to seek international protection as refugees is that they want to avoid the stagnation of their children's educational development while waiting endlessly for the crisis to be resolved. The UNHCR could open channels of schooling and create avenues for the recognition of education acquired, while the international community looks for quick solutions to those crisis. If victims receive adequate protection under internal displacement protection while there is a dialogue to resolve the crisis quickly, many situations will not spill over into a refugee crisis.

Stakeholders have acknowledged that the human traffickers and trans-border criminals are the common enemies of the states and of the international community. The inhuman conditions in which trafficked victims are kept and transported are outright violations of human rights. The near slavery conditions where people are subjected to rape and extortion, call for a universal action against these networks. Their activities tend to give countries justification for violating the non-refoulment principle, so unless a universal effort is made to keep the activities of these networks in check, countries can continue to lean on the concept of relativism, where the end justifies the means.

Recently, protectionist nationalistic narratives have come to the fore, as witnessed e.g. by the statements of Donald Trump on migration and refugee issues ('America comes first'); the Kenyan government has also said that 'Kenya comes first' to justify the closing the Dadaab Refugee camp. This has also played out in Europe, because of the refugee crisis in 2015. Due to the overwhelming number of persons attempting to seek asylum in Europe, European leaders attempted to protect Europe by entering into an agreement with Turkey to manage the crisis, as well as holding talks with African leaders in a meeting in Valetta, Malta⁵¹ trying to fashion ways of keeping the asylum seekers out of Europe. Hungary's efforts - from a relativist point of view can be considered as a Member State on the border of the European Union defending Europe. As much as this study does not defend human rights violation in any manner, it must be said that the relative lack of international/European concerted effort in this humanitarian crisis gives affected countries some leeway in deciding how to overcome these challenges.

The 2016 New York Declaration testifies the need for the Refugee Convention to be treated as a living document. The notion that the document may lose its validity in the process of treating it as a living document could be avoided via the practice of the UNHCR, whose operations are dependent on the validity of the document and thus would have a responsibility to protect it, supported also by the various civil society and human rights groups concerned about the document. Treating the 1951 Convention as a living document could help all stakeholders to legally address these current asylum policy challenges.

⁵⁰ G. Goodwin-Gill, *The Refugee in International Law*, 2nd edn., Oxford University Press, New York, 1996, p. 266.

⁵¹ *African and European Leaders seek compromise on migrants*. EU seeking to give incentive to African Leaders to take back Economic migrants. Wall Street Journal. <https://www.wsj.com/articles/european-african-leaders-seek-compromise-on-migrants-1447268698> (11 April 2017)