
Declaration to Expose Refugee: An Analysis

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Introduction:

One of the fundamental rights that human beings around the world enjoy, that isn't encompassed in any Statute or law, is the right of belongingness. A sense of belonging towards our language, identity, society, faith and country. The idea of not having that is something we are near to never quite understanding. Reading numerous tales of war and conflict, displacement, and loss of life, literally and theoretically, the mere circulated stories become a hard reality in the attempt to understand the ongoing crude disturbances and their legal ramifications.

Created to serve the purpose of inhabiting those displaced due to World War II in Europe, the Convention later extended its scope in 1967 to conflicts around the world by eliminating its geographical restrictions.¹ The main objective of the Convention being to uphold the human rights and dignity of refugees. Signed by twenty six nations to bring it into existence, today the convention has 145 parties signatory to it,² who have protection obligations employed upon them towards a refugee.

Usually when we take into consideration the existence of a legal document, our analysis of it is drawn based on its binding-aces on those concerned apart from other factors. The 1951 Convention is one of the few legal doctrines that the parties to it are supposedly bound by, but not compulsorily. Given the present day scenario where member states are given the liberty to voluntarily decide on how to deal with the refugee influx, irrespective of the hue and cry from world leaders and humanitarian activists, it leaves us with the question: how effective has the Convention really been?

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¹ Article 1 (3), The Protocol Relating to The Status of Refugees, 1967. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article i B (1) (a) of the Convention, shall, unless extended under article 1 B (2) thereof, apply also under the present Protocol

² As of April 2015, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, available at <<http://www.unhcr.org/protectiombasic/3b73b0d63/states-pa rtiesl 951 -convention-its-l 967protocol.html>>

The Definition:

According to the 1951 Convention, the term “refugee” shall apply to any person Who is unable to stay in or is unwilling to return to his country of nationality owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, and owing to such reasons is unable to avail protection in his country of nationality.³ The elements of the definition of refugee that need to be taken into consideration to interpret the situation and grant the status of refugee are:

Well-founded fear of being persecuted: The fear must be well-founded; that is, apart from subjective fear, it must have an objective basis. Circumstances of the individual taking into consideration his background, belief system and activities, play an important factor in justification of recognition. Circumstances of the country of origin is a necessary component in determining the recognition of refugee status.

The fear of persecution presents itself through ill-treatment and hostility towards people in a repetitive, persistent and systematic way. Persecution exists when there is excessive violation of human rights standards and these violations are not confined to those committed by state actors.⁴ In determining whether persecution has ensued, the source of the feared harm is of little relevance. With no defined meaning to what would encompass persecution, the definition is open to a wide array of interpretations.

Under this definition, persecution due to race,⁵ religion,⁶ nationality, membership of a particular social group⁷ or political opinions⁸ are recognized as grounds to seek refuge. But since 1951, the circumstances and situations around the world changed in the most unanticipated way, and the Convention is outdated. Unknowingly, the definition of refugee

³ Article I, The Convention Relating to The Status of Refugees, 1951.

⁴ Supreme Court of Canada, Canada (Attorney General) v. Ward, 30 June 1993, [1993] 2 S.C.R. 689; United States Court of Appeals, Rosa v. INS, 440 F.2d 100 (1st Cir. 1971); In re McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981). ⁵The Rwanda Genocide, 1994: The mass slaughter of the Tutsi community in Rwanda by members of the Hutu majority Government.

⁵ Persian Gulf War, 1991: Iraq Shia uprising against the Sunni Arab Government

⁶ Palestine and Israel Conflict, 1964

⁷ Vietnam War, 1955-75: Persecution against the Hao People

⁸Somali Ole War, 2009: conflict between the forces of the Federal Government of Somalia assisted by African Union peacekeeping troops and various militant Islamist groups and factions

under the Convention in itself is placing a limitation on enabling the states to fulfill their obligations under the Convention effectively.

1.1 Limitations in the interpretation of the Definition: The problems with the definition being:

By expressly stating the categories under which people are victimized which leads to the association of fear to persecution, the definition is hindering the protection that several refugees plead for. There is a restriction placed on the definition due to the inclusive nature of the definition which impliedly excludes the ambit of other reasons to fear persecution. The Convention is open to interpretation when it comes to what can be considered under the purview of the definition within the restrictive grounds for fearing persecution. This leads to an unjust determination process.

Under the Convention the objective is for the international community to affirm the fundamental rights and dignity that human beings enjoy according to the Universal Declaration of Human Rights (UDHR),⁹ along with the UNHCR, without discrimination. For instance, a relatively recent notion in human rights law is discrimination based on sexual orientation. Article 2 of UDHR¹⁰ and Article 2 of the International Covenant on Civil and Political Rights (ICCPR)¹¹ provide for freedom from discrimination on the grounds of sex.

In *Toonen v Australia*¹² the United Nations Human Rights Committee (UNHRC) found that the reference to “sex” in Article 2 of the ICCPR included sexual orientation, thereby making sexual orientation a prohibited ground of distinction in respect of the enjoyment of rights under the ICCPR.

A treaty such as the 1951 Convention is to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its

⁹ UDHR is a document, first of its kind, to draft a common standard for fundamental human rights that are to be universally protected

¹⁰ Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

¹¹ Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language,

¹² (488/1992), CCPR/C/50/D/488/1992 (1994); 1-3 IHRR 97 (1994)

object and purpose.”¹³ The Vienna Treaty Convention specifies that ‘the context’ includes the preamble as a source of the object and purpose of the instrument. The preamble states that the Convention was made taking into consideration that human beings shall enjoy fundamental rights and freedoms without discrimination and that *it is desirable to extend the scope of and protection accorded by instruments guaranteeing the same.*

1.2 Non-Versatility to present day realities:

There are millions of people fleeing indiscriminate effects of violence but their association of persecution to their dire situation is not equally recognized. Such persons might not meet the Convention definition, but may still require international protection on other grounds.

International human rights law reinforces the principle that the Convention is to be applied without discrimination as to sex, age, disability, sexuality, or other prohibited grounds of discrimination.¹⁴ While most countries are to interpret the definition by taking into consideration the individual circumstances of each case, national realities on ground, capacity of the country of origin to tackle the situation¹⁵ and policies and practices¹⁶ that may have caused such fear, most countries usually have a limited stance on the definition. The potential of working around these limitations would’ve been possible if the definition was left open ended or if the definition was inclusive of all human rights violations. The reasons for displacement these days are far more complex than what was considered while drafting the Convention. The Convention doesn’t have the capacity to provide protection for people displaced by several reasons such as displacement due to natural disasters, lack of basic necessary resources for survival, persecution based on gender,¹⁷ etc. that are an imminent

¹³ Article 31, Vienna Convention on the Law of Treaties

¹⁴ In June and July 2008, UNHCR held its Annual Consultations with NGOs, June Standing

_ Committee meeting and Annual Tripartite Consultations on Resettlement (ATCR). The

discussions included sharing expertise in the successful use of alternative human rights mechanisms to obtain protection for persons of concern.

¹⁵ The Handbook on Procedures and Criteria for Determining Refugee Status by UNHCR, para 43(1979), made at the request of State Parties to assist them in applying the refugee definition contained in Article 1 of the 1951 Convention. ”The laws of the country of origin, and particularly the manner in which they are applied, will be relevant. The situation of each person must, however, be assessed on its own merits.”

¹⁶ The 61st session of UNHCR’s Executive Committee (ExCom) that took place in Geneva discussed the need to secure durable solutions for refugees in protracted situations. UNHCR (2004).

¹⁷ it has been left to the practice of the United Nations High Commissioner for Refugees to recognise that ‘Women at Risk’ are a special category of refugee protection.

threat to the lives of people.¹⁸ This shows how the Convention fails to be versatile in the present day realities, which jeopardizes the humanitarian spirit and objective of the Convention.

2. Leniency of bindingness of the Convention:

For recognition of the Convention and the Protocol in relevant scenarios, and to place fundamental significance on the protection of the refugees and people of concern, it is important that the essence of the Convention's provisions are incorporated into the national legislations of the contracting states as widely as possible. Apart from UNHCR, IMO, NGOs and other private bodies involved in the service towards refugees, it is important that Governments of nations and their legislations actively invoke the principles for upholding humanitarian law and human rights in their legal framework. They should be incorporated in a manner that doesn't permit an element of interpretation which could result in reasoning of non-compliance. Once incorporated into the legal framework, the contracting states won't have the discretion to circumvent the obligations and there won't be any ambiguity to their interpretation of the contractual scope.

The relation between International law and national law is not fully clarified nor clearly delineated. The human rights values embodied in the UN Charter, the UDHR, and the ICCPR are all elements of customary International law that are rapidly establishing themselves as jus cogens, if they have not already achieved their status.¹⁹

In the current scenario, the European Union is struggling to come up with an effective policy to deal with the crisis. On one hand, they have the obligations to fulfill under the Convention, on the other they have the Regulations to follow under the EU law that the member states are bound by.

Under the Dublin regulation, refugees are required to claim asylum in the member state in which they first arrive. This would be contrary to the international principle of burden sharing. When states develop regionally specific legal frameworks, it implies that they have different approaches to handling refugee claims. If consistent with the Convention's rules it

¹⁸ Understanding the root causes of displacement: Towards a comprehensive approach to prevention and solutions, available at <<http://www.unhcr.org/56684ce89.html>> On 16-17 December 2015, the retiring UN High Commissioner for Refugees, Antonio Guterres, hosted his annual dialogues on protection challenges, focusing on the topic "Understanding

¹⁹ Compilation Of international Norms And Standards Relating To Disability, under Part I: National Frameworks for the Protection of Rights of Persons with Disabilities, available at <<http://www.un.org/esa/socdev/enable/discom101.htm>>

can strengthen refugee protection, however such endeavors usually don't promote the full and inclusive application of the Convention.

Unfortunately, it is improbable that a state would uphold International law over domestic law. Policies regarding asylum²⁰ in the country of arrival, safe country of origin or safe third country nations that are being advocated in developed nations cannot be implemented in other nations which may receive far larger claims or have less well developed protection capacities. Areas of protection properly covered by the 1951 refugee Convention or human rights instruments such as the ECHR are relegated to national law and the normative grey zone of temporary protection,²¹ when what we need is permanent solutions.

Ultimately, the full realization of the international protection regime with the 1951 Convention at its heart hinges on the ability of the international community to find durable solutions to forced displacement, whether that be voluntary repatriation, resettlement in a third country, local integration, or a combination thereof.

3. Approach of Nations in the ongoing Crisis:

The Refugee crisis that has caught the world's attention has been highly influenced and instigated by the foreign policy of the First World countries. These countries have now conveniently decided upon the extent to which they're Willing to help. Several European nations are pledging to help the refugees subject to conditions that they are only allowed to place in extreme situations. The provisional measures under Article 9 of the Convention²² permit states to refute refuge when there's a risk to the national security. Over the past few years, there have been several terror attacks in Europe that has risked the lives of innocent citizens. The fear of opening borders to people they are not fully aware of is real. However, the sensationalisation through media is something very prevalently being used in tackling the international obligations. Apart from paying greater focus on attacks in the European continent, while reports of attacks elsewhere go highly unnoticed, the politicians and media are preying on the fear of citizens in creating a xenophobic and racist environment. The situation escalated to the extent that the intent behind nationalistic and political command

²⁰ The Convention binds the contracting states to its three major principles; the principle of non refoulement, resettlement and voluntary repatriation

²¹ Philip Alston, Mara R. Bustelo & James Heenan, *The EU and Human Rights* (1999), at 381. 23 Volker Turk and Frances Nicholson, *Refugee Protection in International Law: An Overall*

²² Nothing in this Convention shall prevent a Contracting State, in time of war or other graveand exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

links refugees directly to security determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security. concerns and terrorism, using it as a medium to impose restrictions²³ on immigration and entry, without nationals raising objections to the gross injustice that the refugees are faced with. If more attention was paid to the state-sponsored massive dislocation, this situation would have never arose or have grown worse. Only 6% of the world's displaced people are currently being hosted in Europe, irrespective of this being the largest migration movement since the World War,²⁴ while 86% of the refugees are hosted in low and middle income countries close to situations of conflict.²⁵

3.1. Ongoing European Refugee Crisis:

“Fear cannot be a counsel for political action”. The continuous criticism of the open door immigration policy adopted by the German Chancellor Angela Merkel hasn't affected the progress the country has made in addressing the refugee influx. With previous estimations of 1.1 million refugees to have arrived in Germany, 469,403 immigrants from asylum seekers received social security²⁶ benefits in June and the number of refugees with regular employment²⁷ rose by a third to 104,736 in July. The integration of a large number of refugees makes way for future prospects in the overall development, proving that if Germany can manage the wave of newcomers, “we can do this.”²⁸

“I would like to express my determination to see the British authorities play their part in the humanitarian effort that France is carrying out here and will continue to carry out in the days

²³ Article 3, the 1951 Convention on Non-discrimination: The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

²⁴ UNHCR's Figures at Glance, 20th June 2016. 2' UNHCR Global Trends report 2015

²⁵ Statement by Federal Chancellor Angela Merkel during the Traditional Annual Summer Press

²⁶ Under Article 24(1(b)) of the Convention, Social security includes legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme

²⁷ Obligation regarding Gainful employment is covered under Chapter III of the 1951 Convention. 3" Bundesagentur für Arbeit Statistics; The Federal Employment Agency

²⁸ Statement by Federal Chancellor Angela Merkel during the Traditional Annual Summer PressConference, Berlin, 2015 28 Retrieved from <<http://www.politico.eu/article/francois-hollande-uk-must-do-more-in>

to come.”²⁹ Despite the terror attacks that shook the nation, the French President, Francois Hollande pledges to take in 30,000 more refugees over the next two years. Today as the Government of the United Kingdom grapples with world pressure for cessation of hostility towards refugees, their policy continues to work in their best interest. UK opted out when European leaders and states agreed on a voluntary system for sharing the refugee burden across the EU, retracting their support to the principle of international cooperation and burdensharing. The ultimate reason for Brexit cannot completely be isolated from the ongoing refugee crisis and immigration.³⁰ And the statements of UK’s next PM Theresa May, on recognition and settlement of refugees in the “first safe country”, and imposing restrictions on entry of migrants including those forced, by labelling them “illegal migrants”, only goes to show the deterioration in assistance that the country is likely to provide in the situation.

Meanwhile Canada as a resettlement country is showcasing an ideal approach. 25,08034 refugees stepped into the country receiving a citizen’s welcome from the Prime Minister Justin Trudeau. Canada’s resettlement programs are respected internationally because they provide permanent residence as a long term solution.³¹ In 1993, Canada became the first country to issue gender guidelines for use in refugee determination, recognizing that women can be persecuted on the basis of their gender. Their Immigration and Refugee Board makes decisions along with the UNHCR. It provides free medical care, housing and job assistance, and refugees arriving in Canada are welcomed into homes of Canadian communities, not refugee camps.

With further promises of resettling more refugees by the end of 2016, Canada’s actions are commendable. Countries like Austria, Hungary, and Slovenia who plan on building physical barriers to seal their borders should reconsider their actions that would not only cause a crisis within Europe, but also wouldn’t be in consonance with their humanitarian obligations.

In the middle of the Presidential elections and in the center of the world’s attention, the United States of America hasn’t so far made a prolific impact in the time of difficulty. Being a super power, it has the prime responsibility to confront the situation which was hugely

²⁹ Retrieved from <<http://www.politico.eu/article/francois-hollande-uk-must-do-more-in-calais-jungle-migration/>>

³⁰ Evidence from the BES internet panel and Lord Ashcroft’s large post-referendum poll, available at <<http://blogs.lse.ac.uk/politicsandpolicy/explaining«brexit/>> 3’ As of Feb. 27 2016.

³¹ Article 34 of the Convention mandates states to facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite the naturalization proceedings.

influenced by its political, economic and military actions in the East. While it has been the highest contributor in terms of financial aid; 1,493,799,619 to UNHCR,” it fails to provide other forms of assistance that are necessary given the state of affairs. It is strategically getting away with actual intake of refugees in lieu of geographical factors. The country plans to raise the number of refugees admitted to the US. to 110,000 in 2017 starting on October 15⁴, in comparison to 85,000 this fiscal year. However, there’s skepticism towards the execution of the strategy declared by a President about to exit office in a couple of months.

4. Conclusion

Reinforcing the Convention as the foundation of the refugee protection regime is a common concern. The office of the UNHCR, as the guardian of the Convention, has a particular role to play, but this is a task which requires the commitment of all actors concerned.³²

On September 19th, 193 United Nations members met in New York and signed a declaration.³³ which contains a comprehensive refugee response framework and outlines steps towards the achievement of a global compact on refugees, while setting out a blueprint to realize a safe, orderly, regular and responsible migration by 2018. The Declaration authorizes a set of commitments that apply to refugees and migrants, and a separate set of commitments for refugees and migrants. It reaffirms the policies and principles set out in the Charter of the United Nations and also the Universal Declaration of Human Rights. The Declaration comes at the wake of the Convention and UNHCR failing to make any progress in handling the refugee crisis. In several ways, the Declaration covers aspects that were never covered in the Convention, aspects that the Convention has been criticized over persistently.

4.1 Aspects of the Declaration that weren't considered In the drafting of the Convention:

The Declaration was drafted taking into account different national realities, capacities and levels of development and respecting national policies and priorities, something that the Convention failed to do. States pledged to provide a comprehensive policy, support to mitigate the disproportionality of distribution of responsibility amongst the neighboring and transit countries, by implementing a well-planned and managed migration. The importance of

³² Remarks by President Obama at Leaders Summit on Refugees, The White House Office of the Press Secretary, September 20, 2016, available at <<https://www.whitehouse.gov/the-pressoffice/2016/09/20/remarks-president-Obama-leaders-summit-refugees>>

³³ New York Declaration for Refugees and Migrants (2016) and UNHCR failing to make any progress in handling the refugee crisis. In several ways, the Declaration covers aspects that were never covered in the Convention, aspects that the Convention has been criticized over persistently.

facilitating mass mobility has been recognized through the prospects of sustainable development by more effectively implementing the already adopted 2030 Agenda for Sustainable Development” that recognizes the positive contributions made by migrants.

4.2 Aspects of the Declaration that the Convention’s mere exclusive provision couldn’t curb:

Diversity enriches every society and contributes to social cohesion. Through the implementation of the global campaign³⁴ to counter xenophobia which is yet to be launched, proposed by the UN Secretary General Ban-Ki-Moon, the UN and all relevant stakeholders wish to mitigate racism, xenophobia, racial and religious discrimination and other acts of intolerance directed at refugees based on stereotypes.

4.3 Aspects of the Declaration not included in the Convention:

Member states that signed and ratified the Paris Agreement reinstated their commitment to the Sendai Framework for Disaster Risk Reduction 2015-2030”, concerning risks associated with disasters focusing on a response to the adverse effects of climate change, natural disasters, or other environmental factors, and professed the implementation of measures to mitigate them.

4.4 Aspects of the Declaration that the Convention doesn't bind the contracting states to consider:

States recognized the desperation with which asylum seekers turn to criminal groups, traffickers and smugglers for their services, and realized the imminent need to provide them with a safe and dignified alternative to oblige to their human rights needs and fundamental freedoms. “We should remember that refugees’ human rights travel with them”³⁵ Irrespective of the separate legal frameworks that govern refugees, their treatment is based on the common universal human rights and fundamental freedoms.

With nations approaching international protection needs through different procedures, the Declaration seems to be the only progress we’re making collectively in terms of upholding the 1951 Convention and its 1967 Protocol’s core principles by focusing on the inter-

³⁴ The campaign will emphasize, inter alia, direct personal contact between host communities and refugees and migrants and will highlight the positive contributions made by the latter, as well as our common humanity. 42 FCCC/CP/ZOj 5/L.9

³⁵ Antonio Guterres, 2009 International Conference on Urban Displacement“ UNHCR Figures at Glance 2015, Source; UNHCR / 20 June 2016.

relationship between international refugee law and international humanitarian and human rights obligations by going beyond the specific terms.

There are 65 million forcibly displaced people, of which more than 21 million are refugees, 3 million asylum seekers, and 40 million internally displaced people, majority of this population comprising of children and women, and this is only as of 2015.⁴⁵ The year 2016 marked 65 years of the 1951 Convention. The loopholes in the initial groundwork of the Convention has withheld progress. But progress cannot be measured merely on a Convention that binds nations. Progress must be measured in terms of the humanity that binds us all, citizens of the world & fellow human beings, society and communities, leaders and neighboring countries. Being ignorant or selfseeking, or resorting to hypocrisy or malicious exaggeration as an escape from humanitarian obligations is not ideal in the world we wish to build through development, personal and communal achievements in any field. A world that lacks basic understanding, consideration, togetherness and benevolence isn't progressing at all.
