

Roundtable on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence

13 and 14 September 2012

Refugee Rights Project, University of Cape Town, South Africa

**Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence**

The Office of the United Nations High Commissioner for Refugees (UNHCR) convened a roundtable on the International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence in Cape Town, South Africa on 13 and 14 September 2012, hosted by the Refugee Rights Project of the University of Cape Town. The roundtable was organized as part of a broader project to develop Guidelines on International Protection<sup>1</sup> and to clarify the interpretation and application of international and regional refugee law instruments to persons fleeing armed conflict and other situations of violence across international borders. The background to the roundtable is a perception that the definition of a refugee in the 1951 Convention relating to the Status of Refugees (1951 Convention)<sup>2</sup> and the 1967 Protocol relating to the Status of Refugees (1967 Protocol)<sup>3</sup> does not easily map on to the size, scale and character of many modern conflicts or violent situations and refugee movements. Meanwhile, a number of refugee and complementary/subsidiary protection instruments have been developed at regional and national levels to more explicitly cover persons fleeing inter alia the broader effects of armed conflict and other situations of violence. These developments raise questions about the relationship between these instruments and the 1951 Convention and the 1967 Protocol (hereafter jointly referred to as the 1951 Convention).

Participants included 30 experts from fifteen countries drawn from governments, NGOs, academia, the judiciary, the legal profession and international organizations. Four background papers and presentations by the authors, as well as two additional presentations, informed the discussion.<sup>4</sup>

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<sup>1</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>. The Guidelines complement and update the Handbook and should be read in combination with it.

<sup>2</sup> Convention relating to the Status of Refugees, 28 July 1951 (entered into force 22 April 1954), 189 UNTS 137 (1951 Convention).

<sup>3</sup> Protocol relating to the Status of Refugees, 31 January 1967 (entered into force 4 October 1967), 606 UNTS 267 (1967 Protocol).

<sup>4</sup> The background papers included: (1) Theo Farrell and Olivier Schmitt, *The Causes, Character and Conduct of Armed Conflict, and the Effects on Civilian Populations, 1990-2010*, April 2012, PPLA/2012/03, available at: <http://www.unhcr.org/refworld/docid/4f8c3fcc2.html>; (2) Vanessa Holzer, *The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, September 2012, PPLA/2012/05, available at: <http://www.unhcr.org/refworld/docid/50474f062.html>; (3) Valerie Oosterveld, *Women and Girls Fleeing Conflict and Generalized Violence: Gender and the Interpretation and Application of the 1951 Refugee Convention*, September 2012, PPLA/2012/06, available at: <http://www.unhcr.org/refworld/docid/504dcb172.html>; (4) Marina Sharpe, *Preliminary Assessment Report of Case Law and Other Primary Sources, 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence within the Context of Individual Status Determination Procedures*, forthcoming. Presentations were also provided by Michael Reed-Hurtado on the interpretation and application of the 1984 Cartagena Declaration, and Bonaventure Rutinwa on

These Summary Conclusions do not necessarily represent the individual views of participants or UNHCR, but reflect broadly the themes and understandings emerging from the discussion.

### **Understanding contemporary armed conflicts and other situations of violence**

1. The second half of the 20<sup>th</sup> century saw a steep rise in the number of internal armed conflicts and other forms of violent situations leading to mass displacement across borders. Since the end of the Cold War, two main trends in the causes, character and impact of armed conflict and other situations of violence can be observed. First, there has been a rise in non-international armed conflicts involving a diversity of armed actors along with different modes of violence thus blurring the traditional boundaries between war and peace and between combatants and civilians. Second, while there has been a general decline in the lethality of armed conflicts, there has been an increase in the targeting or terrorizing of civilians (and other forms of “coercive violence” aimed, for example, at controlling the population). The use and availability of low technological weaponry has also aided the spread of conflict into civilian areas, including urban settings. Meanwhile, the indirect effects of conflict – including poverty, economic decline, inflation, violence, disease, food insecurity and malnourishment and displacement – need to be taken into account.

2. Internal and external displacement can also be an indication of the intensity of the conflict, and its impacts, but it should not be seen in isolation from other factors. Depending on the situation, persons may be unable to leave their areas of habitual residence as they become trapped – sometimes periodically and sometimes cyclically – in the zone of conflict, including in situations of urban violence and warfare. Displacement has also been used as a direct military strategy in some conflicts, including in the form of “ethnic cleansing” or genocide.

3. Quantitative data on armed conflicts remains unreliable and systematic hidden errors in the collection and interpretation of data are not uncommon (see also paragraph 39 below). Such data may also be biased in favour of fatalities, and may not capture harm other than deaths, or other impacts such as trauma, inter-generational health problems, diminished female or minority participation in public life, disruption of education, etc. Any data should therefore be approached with great caution and should be triangulated with other information as part of an overall assessment. Quantitative data always needs to be complemented by qualitative data.

4. On the causes of contemporary armed conflict and other situations of violence, it was noted that there is usually no singular explanation for a particular conflict, and that there are multiple and overlapping causes, which may change over time. Different or similar causes may lead to the perpetuation of conflict or may reignite it. Reasons underlying armed conflict, or other situations of violence, range from political, ethnic or religious, to the exploitation of economic resources, to drugs trade and gang activities. Further, while the roundtable did not discuss in detail the meaning of “other situations of violence”, the phrase was used to refer to violence below the threshold of armed conflict.

5. The phenomenon of recruitment of child soldiers was mentioned explicitly as a pervasive characteristic of contemporary conflicts, including the challenges their cases present for refugee status decision-makers and adjudicators. One particular issue that arose in this context was how to assess voluntariness. While children may appear to make rational decisions to join armed groups or the armed forces, this decision cannot be determined to be

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the relationship between the 1951 Convention Relating to the Status of Refugees (1951 Convention) and the 1969 OAU Convention governing Specific Aspects of Refugee Problems in Africa (1969 OAU Convention) from an historical perspective. Both presentations will be published in due course.

voluntary in circumstances where the decision is based on fear or for the purposes of ensuring their own economic survival or safety. The illegality of child recruitment is also an important factor in assessing their claims to refugee protection.<sup>5</sup>

### **Applying the 1951 Convention to persons fleeing armed conflict or other situations of violence**

6. The 1951 Convention is the primary instrument for the protection of refugees, including those fleeing armed conflict and other situations of violence. Nothing in the text, context or object and purpose of the 1951 Convention hinders its application to armed conflict or other situations of violence. In fact, the 1951 Convention makes no distinction between refugees fleeing peacetime or wartime situations. Drafted in the aftermath of World War II, the drafters understood that individuals fleeing from armed conflict and other situations of violence may have a well-founded fear of being persecuted for one or more Convention grounds. Yet, a wide variation in refugee recognition rates for persons from countries in conflict suggests divergences in the application of the 1951 Convention.<sup>6</sup> While there is some good State practice in applying the 1951 Convention to persons fleeing armed conflict and other situations of violence, there are also jurisdictions where erroneous or overly restrictive interpretations of the 1951 Convention refugee definition are commonplace. In still other countries, an over reliance on the use of non-Convention protection is evident, for example under complementary/subsidiary protection regimes, which can deny Convention refugees the protection they require and deserve.

7. For the purposes of applying the 1951 Convention refugee definition, classifying a particular situation as an armed conflict can be a relevant component of the background to the refugee claim, but it too frequently distorts the assessment of the basis for the claim, emphasizing issues around the generalized impact of violence rather than persecution, or around the credibility of the claim for protection. Participants noted that, in every claim for refugee protection, it remains necessary to understand and analyze the factual situation in the country of origin in its proper context, including the causes, character and impact of the conflict or violence on the applicant and others similarly situated and how the individual applicant is affected by the factual situation. Quality country of origin information should avoid generalizations about the conflict and may highlight groups that are persecuted.<sup>7</sup>

#### *A well-founded fear of being persecuted*

8. A person's risk of being persecuted must be assessed in the context of the overall situation in the country of origin, taking into account general as well as individual circumstances. In armed conflict and other situations of violence, whole communities may suffer or be at risk of persecution. The fact that many or all members of particular communities may be equally at risk does not undermine the validity of any particular claim. The test is whether an individual's fear of being persecuted is well-founded. In fact, at times, the impact of a conflict on an entire community strengthens, rather than weakens, the risk to any particular individual.

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<sup>5</sup> Convention on the Rights of the Child, 20 November 1989 (entered into force 2 September 1990), 1577 UNTS 3 (CRC), Article 38. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict, 25 May 2000 (entered into force 12 February 2002), 2173 UNTS 222, Articles 2 and 3. Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute), Articles 8(2)(b)(xxvi) and 8(2)(e)(vii).

<sup>6</sup> UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011, available at: <http://www.unhcr.org/refworld/docid/4e2ee002.html>.

<sup>7</sup> UNHCR, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions*, July 2011, paras. 22-25, available at: <http://www.unhcr.org/refworld/docid/4e1729d52.html>.

9. There is no basis in the 1951 Convention for holding that in armed conflict or other situations of violence, an applicant needs to establish a risk of harm over and above that of others caught up in such situations (sometimes called a “differentiated risk”). Further, there is nothing in the text of the 1951 Convention to suggest that a refugee has to be singled out for persecution, either generally or over and above other persons at risk of being persecuted. A person may have a well-founded fear of persecution that is shared by many others.

### *Persecution*

10. Threats to life or freedom, serious human rights violations, including torture or inhuman or degrading treatment, and other forms of serious harm constitute persecution for the purposes of the refugee definition, whether committed in times of peace, armed conflict, or other situations of violence. Likewise, serious violations of international humanitarian law (IHL) can constitute persecution.<sup>8</sup> In the context of armed conflict and other situations of violence, no higher level of severity of harm is required for conduct to amount to persecution. The question is not whether persons would be treated worse in situations of conflict or violence than in times of peace, but whether the individual fears persecution on account of a protected ground.<sup>9</sup>

11. A risk of regular exposure to violent conduct and other consequences common in situations of conflict can amount to persecution within the meaning of Article 1(A)(2) of the 1951 Convention, either independently or cumulatively, depending on the seriousness of the conduct or its consequences. Such conduct can include more general conduct such as shelling and bombardments, cutting of food supplies, militarization of hospitals and schools, as well as conduct – or the consequences thereof – that are more long-term and indirect, such as food insecurity, poverty, collapse of the political, health care and education systems, or displacement. It can also include methods of warfare representing conduct that is more individual in nature such as security checks, house or office raids, interrogation, personal and property searches, forced evictions, sexual violence or restrictions on freedom of movement.

12. In regulating the conduct of hostilities IHL can provide guidance to establish if certain conduct amounts to persecution for the purposes of applying the 1951 Convention refugee definition. However, there was a difference of opinion at the roundtable whether the IHL definition of “armed conflict” was useful to the determination of refugee status and persecution. Determining whether a situation in the country of origin qualifies as an “armed conflict” was considered to be a distraction from the refugee question, which revolves around what predicament the individual would face if s/he were returned to his or her country of origin; and in addition, many violent situations are not classed as “armed conflicts” yet their means employed and their consequences may be just as violent or persecutory. At least one participant felt the predicament analysis would give too wide a scope for subjective decision-making.<sup>10</sup>

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<sup>8</sup> UNHCR, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions*, July 2011, paras. 13-21, available at: <http://www.unhcr.org/refworld/docid/4e1729d52.html>.

<sup>9</sup> For example, see Guideline 1: Civilian Non-Combatants Fearing Persecution in Civil War Situations, Immigration and Refugee Board of Canada, available at: <http://www.irb-cisr.gc.ca/eng/brdcom/references/pol/guidir/Pages/civil.aspx>: “A person taking no active part in hostilities associated with a civil war should be treated by the combatants humanely and without adverse consequences. [...] The fact that the treatment feared by the claimant arises from the hostility felt, or the violence engaged in, by combatants directly involved in the civil war does not exclude the possibility that it could constitute persecution” (footnotes removed).

<sup>10</sup> In determining what constitutes an “armed conflict” participants pointed to the fact there is no agreed definition, nor clarity on who decides whether an “armed conflict” exists. Nonetheless, the International Committee of the Red Cross’ Opinion Paper, “How is the Term Armed Conflict Defined

### *The Causal Link and the Convention Grounds*

13. Determining which Convention ground(s) is of relevance for an applicant fleeing armed conflict and other situations of violence needs to be derived from the factual context, including the causes, character and impact of the feared harm.

14. The causal link (or nexus) required under the 1951 Convention definition refers to the refugee's predicament rather than the persecutor's mind-set. Such a predicament may be affected by the motivation of the persecutor but also more broadly by the causes, character as well as the foreseeable impact of the conflict or violence.

15. When assessing international protection for persons fleeing armed conflict and other situations of violence, each – and more than one – of the 1951 Convention grounds may be relevant. An analysis of the causes, character and impact of the conflict and/or violence is necessary to determine the relevant Convention ground(s) and the causal link with the well-founded fear of persecution. Claims from persons who have fled a conflict or violent situation can raise complex factual issues and are highly contextual, turning on the particular characteristics, attributes and background of the applicant viewed against the causes, character and impact of the conflict and violence.

16. The conflict and violence may be motivated or driven by ethnic, religious, political, or social divisions; or may impact people along ethnic, religious, political, social or gender lines. The conflict and violence may also have aspects that are outside the scope of the 1951 Convention, such as economic or criminal motivations, but these too are regularly interconnected with Convention grounds. These motivations, drivers and impact often imply the existence of a Convention ground for persons belonging to a certain race, nationality, religion, and particular social group or having a certain political opinion.

17. In some armed conflicts or other situations of violence harm may appear to be indiscriminate. However, the underlying causes, character and/or impact of the violence causing harm may reveal that it is in fact discriminate. For example, on the face of it, civilians in a particular conflict may appear to be at a general risk of harm from bombing, shelling, suicide attacks and/or the use of improvised explosive devices. However, these methods of violence may also be used to target particular groups of civilians or the areas where they reside or gather, because of their real or perceived ethnic, religious, political, or social profiles. Where this is the case, these acts may be persecutory and linked to a 1951 Convention ground. Notably, too, violence may be both generalized (for example, because it is experienced throughout the territory) and discriminate (for example, because there are targeted attacks against particular groups) at the same time.

18. The question of imputed political, religious or other identities or views was also discussed, with a particular call for further research into imputed social group in the context of armed conflict and violence. There were also mixed views on whether "civilians" could be a particular social group for the purposes of the refugee definition. Some participants considered that "civilians" could only be a recognizable "social group" in highly militarized societies. Others argued that the targeting of "civilians" during a conflict ordinarily had political connotations.

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in International Humanitarian Law", March 2008, <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>, was thought useful. See also, UNHCR, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions*, July 2011, para. 22, available at: <http://www.unhcr.org/refworld/docid/4e1729d52.html>.

19. To establish the causal link between a well-founded fear of persecution and a Convention ground, it is not necessary that the asylum-seeker is known to, or was sought out or targeted individually by, the persecutor(s). As acknowledged in UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status, often the asylum-seeker may not be aware of the reasons for the persecution feared. It is not his or her duty to analyze his/her situation to such an extent as to identify the reasons in detail,<sup>11</sup> and this cannot be seen as a precondition for eligibility for protection.

*Gender-related persecution in armed conflict*

20. It was acknowledged that violence during situations of armed conflict directed at women and girls, or men and boys, on account of their gender, alone or in combination with other factors, can be persecutory.

21. Rape and other forms of gendered physical, sexual and psychological violence are common forms of persecution perpetrated in situations of armed conflict, particularly against women and girls, and sometimes against men and boys. Rape in conflict is by definition persecutory irrespective of the purpose behind the rape or motivation of the perpetrator. The effects of rape, including social stigma and increased vulnerability to violence and discrimination, may also amount to persecution. Other forms of gender-related persecution common in armed conflict and other situations of violence include human trafficking, sexual slavery and conjugal slavery/forced marriage.

22. Both substantive and procedural/evidentiary issues were discussed. Five particular issues were raised. The first was the issue of credibility. In assessing the credibility of a claim for refugee status based on gender-related persecution, decision-makers need to ensure that they do not succumb to stereotyped assessments of how women or girls – or men or boys – respond (or are expected to respond) to such violence.

23. The second issue was that of the evidentiary standard of proof. For example, if rape against women and girls is widespread and/or systematic in a given conflict, a well-founded fear of persecution can be established merely by the fact of being a woman or girl (that is for reasons of her gender); yet research has shown that the claims of many victims or persons at risk of rape from countries in conflict are regularly rejected.<sup>12</sup> Gender-sensitive country of origin information was also highlighted: it is often not available, and at times, it may be inaccurate because of a lack of corroborative information on gender issues. It was noted that the same problem of lack of country of origin information was evident in children's claims as well as those based on sexual orientation and/or gender identity.

24. Third, in establishing persecution, it was noted that the after-effects or longer-term consequences of sexual and gender-based violence are often ignored, or not fully taken into account. Such effects could include stigma, discrimination, social, cultural and economic exclusion, increased vulnerability to violence or threats of death. The absence of professional psychosocial services in countries of origin can be a relevant element in assessing a claim.

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<sup>11</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV.3, para. 66, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

<sup>12</sup> H. Baillot, S. Cowan and V. E. Munro, "Hearing the Right Gaps: Enabling & Responding to Disclosures of Sexual Violence within the UK Asylum Process" (2012) 12 *Social and Legal Studies* 269-296; H. Baillot, S. Cowan and V. E. Munro, "Crossing Borders, Inhabiting Spaces: The (In) Credibility of Sexual Violence in Asylum Appeals" in S. Fitzgerald, ed., *Regulating the International Movement of Women: From Protection to Control* (New York: Routledge, 2011) 111-131.

25. Fourth, the mischaracterization of acts of sexual and gender-based violence as committed, for example, for reasons of personal gratification rather than an exercise of power or political control, or private rather than state or political coercion, was also noted as a problem, including in respect of the relevant Convention ground. The focus on the motivations of the individual perpetrator is very difficult to assess with any accuracy and can distort and downplay the overall violence as well as impunity created by the conflict. While recognizing that “membership of a particular social group” is the typical ground applied in such cases, the other grounds – in particular, real or perceived political opinion, ethnicity and/or religion – may also apply, especially in conflicts that target women and girls as part of military strategies, or where women and girls advocate against their mistreatment during conflict.

26. Finally, it was noted that decision-makers often classify the risk of gender-related violence as part of the general indiscriminate consequences of conflict, and therefore not persecutory in the sense of the 1951 Convention definition. This appears to be done without consistently considering the potential gender-related reasons for that violence (for example, the various ways in which rape is used as a weapon of war or as “coercive violence” to destroy the social fabric of the society) or the broader political and other dimensions of conflict.

### **Refugee status under the 1969 OAU Convention and the 1984 Cartagena Declaration and the relationship with the 1951 Convention definition**

27. While the 1951 Convention is the universal and primary legal protection instrument for refugees, regional refugee instruments complement the 1951 Convention. In particular, they incorporate the 1951 Convention refugee definition and also contain a further – extended – definition of a refugee.

28. In terms of rights or status of refugees following recognition as a refugee under the 1951 Convention or the regional refugee law instruments, there is no hierarchical relationship between the 1951 Convention definition and the regional refugee definitions contained in Article I(2) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and Conclusion III(3) of the 1984 Cartagena Declaration on Refugees (cf. subsidiary protection under the European Union Qualification Directive, see paragraphs 36 and 37 below). The 1969 OAU Convention and the 1984 Cartagena Declaration incorporate the rights granted to refugees under the 1951 Convention. The regional refugee definitions determine who is to be accorded international protection as a refugee, assuring the widest possible exercise of fundamental rights and freedoms. The regional definitions, in particular Article I(2) of the 1969 OAU Convention, have a specific, but not exclusive, application to refugees in situations of mass displacement, making it easier to determine refugee status based on objective situational circumstances in the country of origin to which these definitions refer.

#### *1969 OAU Convention*

29. The 1969 OAU Convention, with a humanitarian object and purpose, was considered particularly relevant in the African context and contemporary forms of non-international armed conflict and other situations of violence. In addition to incorporating the 1951 Convention refugee definition, the 1969 OAU Convention also provides international protection to refugees on the basis of the objective situation in the country of origin, namely “external aggression, occupation, foreign domination or events seriously disturbing public order”. Despite this objective orientation, it was noted that the definition requires a causal link between the objective situation and the person’s compulsion to leave and seek asylum. Where the objective situations referred to in the 1969 OAU Convention affect the whole of the country or territory from which the person has fled, the existence of a causal link between the

situation and the compulsion to leave may be presumed to exist. In fact, recognition of refugee status on a *prima facie* basis – based on an objective assessment of the situation in the country of origin – developed as an accommodation technique or procedural/evidentiary shortcut for determining refugee status in mass influx situations, although it was also noted that *prima facie* techniques are also applicable under the 1951 Convention (see paragraph 40 below).

30. Of the four 1969 OAU Convention situations, it was noted that “events seriously disturbing public order” is the most commonly used ground, including to persons fleeing armed conflict, serious internal disturbances, gross violations of human rights, or other similar situations.

31. Based on the material in the background paper,<sup>13</sup> and confirmed by the presentations from a number of African governments participating in the roundtable, three approaches to the relationship between the 1951 and the 1969 OAU Conventions in individual refugee status determination procedures were observed: first, a sequential approach in which an assessment on the basis of the criteria of the 1951 Convention refugee definition, as stipulated in Article I(1) of the 1969 OAU Convention, preceded the application of the 1969 OAU Convention’s Article I(2) definition; second, a “nature of flight” approach, in which the prevailing situation in the country of origin (for example, an armed conflict) would lead to an initial application of the 1969 OAU Convention Article I(2) definition, rather than the 1951 Convention refugee definition; and third, a pragmatic approach, in which the 1969 OAU Convention Article I(2) definition is applied for reasons of efficiency and ease.

32. It was argued that the sequential approach more closely follows the scheme of the international and African instruments, with the 1951 Convention as the primary instrument. It was also thought to reflect the approach in other regions (Europe was mentioned specifically; see paragraph 36 below). At the same time, the “nature of flight” and pragmatic approaches were also considered to be acceptable in situations where the cause of flight was clear. Also, as the rights and status of the 1969 OAU Convention Art I(2) are equivalent to those enjoyed by 1951 Convention refugees, common sense might argue in favour of the “nature of flight” and pragmatic approaches. At the same time, further consideration needs to be given to any later disadvantage to people not assessed for protection under the 1951 Convention. Access to resettlement and cessation were noted explicitly. In relation to the latter, for example, exemption from cessation is based amongst others on establishing “past persecution”.<sup>14</sup>

#### *1984 Cartagena Declaration on Refugees*

33. The 1984 Cartagena Declaration is a set of (non-binding) conclusions aimed at promoting the establishment of a protection regime in Latin America and ensuring basic treatment for refugees. It is based on the precepts contained in the 1951 Convention as well as the 1969 American Convention on Human Rights. It follows the developments in Africa, in particular the “objective circumstances” approach of the 1969 OAU Convention. The regional refugee definition in the 1984 Cartagena Declaration is meant to provide a concise reference point to expand humanitarian responses and develop national laws and policies.

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<sup>13</sup> Marina Sharpe, *The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination*, forthcoming.

<sup>14</sup> UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003, HCR/GIP/03/03, available at: <http://www.unhcr.org/refworld/docid/3e50de6b4.html>. UNHCR, *Guidelines on Exemption Procedures in respect of Cessation Declarations*, December 2011, available at: <http://www.unhcr.org/refworld/docid/4eef5c3a2.html>.



34. The 1984 Cartagena Declaration in Conclusion III(3) calls on countries in Latin America to use a definition or concept of “refugee” that, in addition to those covered by the 1951 Convention definition, also includes “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”. In the current environment in parts of the Americas, where in certain countries violence is escalating, the growth in individual refugee status determination procedures and the limited import of the CIREFCA Legal Document,<sup>15</sup> the need for guidelines on how the definition is to apply within individual procedures was emphasised. At least one participant encouraged caution in being too fixated on providing strict legal definitions of the separate elements in the definition, preferring instead the encouragement of a flexible “humanitarian” approach to interpreting the elements in the definition. Others considered that this “humanitarian” approach would not adequately respond to the needs of lawyers and adjudicators in individual refugee status determination procedures.

35. The term “generalized violence” contained in the 1984 Cartagena Declaration was discussed in some detail. It was felt, however, that rather than trying to settle a definition of the term, or of the other terms, it would be more helpful for a range of indicators or a “spectrum” approach to be developed, including consideration of temporal and spatial dimensions, such as gravity/severity, intensity, and effects/consequences of the violence, violations or disturbances.

#### **Subsidiary protection under the EU Qualification Directive and the relationship with the 1951 Convention definition**

36. The EU Qualification Directive<sup>16</sup> acknowledges the primacy of the 1951 Convention and requires that it is first determined who qualifies as a refugee in accordance with the 1951 Convention before assessing subsidiary protection. It is both a sequential as well as a hierarchical (in terms of rights) relationship, which is different from the relationship of the 1969 OAU Convention and the 1984 Cartagena Declaration to the 1951 Convention (see paragraph 28 above). However, in practice, especially in the context of persons fleeing armed conflict and other situations of violence, the sequential assessments are not always undertaken adequately. Frequently, it appears that the assessment of international protection needs on the basis of the 1951 Convention is rather superficial, resulting in an over-reliance on the application of Article 15(c) of the EU Qualification Directive on the basis of designating the situation in a country or region as meeting the threshold for the application of Article 15(c) of the EU Qualification Directive. According to Article 15(c) of the EU Qualification Directive people qualify for subsidiary protection when faced with a real risk of suffering serious harm consisting of a “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”.

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<sup>15</sup> Principles and Criteria for the Protection and Assistance of Central American Refugees, Returnees and Internally Displaced in Latin America (“CIREFCA Legal Document”), UN, CIREFCA, Ciudad de Guatemala, 29-31 May 1989, Distr. General CIREFCA 89/9, April 1989. (English version) *Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America*, January 1990, available at: <http://www.unhcr.org/refworld/docid/4370ca8b4.html>.

<sup>16</sup> European Union: Council of the European Union, *DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, L337/9, available at: <http://www.unhcr.org/refworld/docid/4f197df02.html>.

37. On the meaning of “armed conflict” in Article 15(c) of the EU Qualification Directive, it was agreed that it does not have an autonomous meaning, though IHL should be regarded as informative and not determinative. As noted above at paragraph 12, there are situations that may not meet the threshold of armed conflict within the meaning of IHL, yet persons displaced by those situations are nonetheless in need of international protection as a refugee, or should receive subsidiary protection under the EU Qualification Directive. What should be determinative in providing international protection is the need for international protection, not the legal qualification of the conflict that generates that need.<sup>17</sup>

### **Procedural and credibility related issues**

38. Armed conflict and other situations of violence often create, for entire groups, a risk of being persecuted, including in the form of threats to life, safety or freedom on one or more of the Convention grounds. As a result, each member of the group seeking international protection may be regarded *prima facie* as a refugee under the relevant instrument.

39. While in general the burden of proof lies on the person submitting the claim, the obligation to gather and analyze all relevant facts and supporting evidence and determining eligibility for refugee status is shared between the applicant and the decision-maker. This is particularly important if the country of origin is experiencing armed conflict or another situation of violence as this makes obtaining information and documentation in general – as well as in relation to the individual – more difficult. It is therefore also important that applicants are given the benefit of the doubt, notably in the absence of supporting evidence.

40. In practice, such evidential bars to recognition for individual applicants could be obviated by declarations or designations of entire countries or specific regions of a country as areas from which, because of the prevailing conditions, all persons who left between relevant dates, and potentially for specific reasons are granted refugee status. Individual applicants need then only establish their identity, their country or region of origin, and date of departure. In such scenarios it still remains necessary to determine, if relevant in the individual case and to the extent possible, that exclusion provisions do not apply.

41. Decision-makers should use statistical data with great caution when assessing international protection needs. Different sources use different methodologies, often depending on their motivation for collecting statistics, resulting in substantial divergences. Statistical data can provide an indication of the impact of conflict and violence on the civilian population, but they can be inconclusive or unreliable regarding the risk, harm and/or relevant Convention ground.

### **Next steps**

Participants encouraged UNHCR to develop international protection guidelines on these issues, including the regional refugee definitions and the EU Qualification Directive.

Division of International Protection  
UNHCR  
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<sup>17</sup> UNHCR, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions*, July 2011, para. 24, available at: <http://www.unhcr.org/refworld/docid/4e1729d52.html>.